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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 608

HOWARD J. THECKSTON and
CAROLINE THECKSTON,
Petitioners,

vs.

TRIANGLE PUBLICATIONS, INC., a Corporation of Delaware, and DENNIS M. HIGGINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled case on July 8, 1968.

OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey (Appendix B, *infra,* p. 1b), is reported in 52 N. J. 173 (1968), The opinion of the Appellate Division of the Superior Court of New Jersey, reversing Petitioners' judgments against the Respondents (Appendix B, *infra,* pp. 1b-7b), is reported in 100 N. J. Super. 452 (App. Div. 1968).

The opinion (Conclusions) of the Superior Court of New Jersey, Law (trial) Division, by Alexander C. Wood, 3rd, County Court Judge, denying motion of Respondents for a new trial (Appendix B, *infra,* pp. 7b-16b), appears in "Appendix for Appellants", (Respondents here), Vol. I, 32a-41a. Portions of the Judge's charge to the jury, relating to the *New York Times "Actual Malice" Rule* (Appendix B, *infra,* pp. 16b-36b), appear in said Appendix below, in Vol. II, pp. 542a:22 through 549a:8; 550a:19-40; 556a:23-557a:16; and in "Appendix for Respondents" (Petitioners here), pp. 32a:21 through 44a:3; 45a:9-37, pp. 60-73.

Memorandum handed to jury by trial Court stating *New York Times Actual Malice Rule* (Appendix B, *infra,* pp. 37b-38b), appears in said "Appendix for Respondents" (Petitioners here), p. 46a.

JURISDICTION.

The judgment of the Supreme Court of New Jersey (Appendix B, *infra,* p. 38b), was entered on July 8, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., ¶ 1257 (3).

QUESTIONS PRESENTED.

1. Where State Appellate Court in its opinion gave the *New York Times "Actual Malice" Rule* such a rigid and narrow and improper construction that it appeared to limit liability of a newspaper to a "public official" virtually to proof of actual knowledge of falsity of defamatory statements and even down-graded that, and referred to but did not seem to apply alternative part of the rule to the evidence of reckless disregard of whether statements were false or not, and evidence was sufficient under either aspect of rule, reversal of judgment on jury verdict based on such reckless publication seems to disregard this co-equal standard of the Federal rule, in fact fore-part, too, and, therefore, should not judgment of reversal be set aside and original judgment reinstated?

2. Where the State Appellate Court only had a small part of the trial transcript in the appendix or record on appeal, was it contrary to the applicable and repeated decisions of this Court that an independent examination of the record as a whole, had to be made as the prerequisite to determine that the evidence was insufficient to justify a jury verdict for "public official" under the *New York Times Rule*?

3. Where the Petitioner was clerk of a small cause court and instituted action for libel based upon a series of publications which referred to him throughout as "a minor official"; and trial court held that he was a "public official" under *New York Times Rule* and he objected throughout the trial to such holding and also excepted to the court's charge of the rule governing the case; and there was verdict and judgment for Petitioners and Respondents here appealed, and Petitioners' brief there referred to said objections, was it error by State Court to determine that Petitioners had not challenged court's ruling and disregard same; and further, holding that Petitioner was "public official" within contemplation of *New York Times* rule?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are set forth in Appendix A, *infra*, p. 1a.

STATEMENT OF JUDGMENT AND FEDERAL QUESTIONS.

The judgment of the Supreme Court of New Jersey, entered July 8, 1968 (Appendix B, *infra*, p. 38b), denied Petitioners' Petition for Certification to review judgment of the Appellate Division of the Superior Court of New Jersey which reversed judgment of the Superior Court, Law Division, and remanded the matter for entry of a judgment in favor of defendants (respondents here), by mandate or Judgment on Reversal entered April 25, 1968, issued May 23, 1968, Appendix B, *infra*, p. 39b.

The Federal question was raised in the Superior Court of New Jersey, Law Division, in the Appellate Division of the Superior Court, and in the Supreme Court of New Jersey. The Trial Judge ruled and tried the said action under the Federal rule, that prohibits a "public official" from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not, as held by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. ed 2d 686, (1964).

The Federal question, constitutional right of free speech, was stated as issue in pretrial order (Appendix for appellants below, Vol. I, p. 26a:12). At the outset of the proceedings, the Court determined and ruled as a matter of law that the plaintiff "was a public official within *New York Times* and *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 669, (1966), (Ibid., Conclusions, 36a:14)." The Court charged that the petitioner was a "public official" and subject to the *New York Times Rule* (Ibid., Vol. II, 542a:38-545a:1). The petitioners excepted thereto. Respondents in statement of questions involved alleged complete absence of evidence within *New York Times Rule,* "Brief for Appellants" (respondents here) p. 1. Petitioners challenged in counter-statement of questions involved in "Brief of Respondents" (petitioners here), p. 1. Appellate Division reversed because of insufficiency of evidence under *Times* rule (Appendix B, *infra,* pp. 1b-7b).

Petitioners applied to Supreme Court of New Jersey and alleged in Statement of Questions Involved that Appellate Division erred (1), assuming "whole record" before it because of insufficiency of proofs to present a jury issue required by *Times* rule, (2) assuming only printed Appendix before it, it erred likewise, (3) erred in not considering and holding that petitioner, a court clerk, was a "public official" under *New York Times,* where he objected throughout trial

and excepted to ruling, and (4) erred in reversing without entire record in Appendix or record below, but only small portion and independent examination of the "whole record" as decided by the decisions of this Court (Petition for Certification, Statement of Questions Involved), Appendix B, *infra*, p. 39b-40b; Counterstatement of Questions Involved, Brief for Respondents (Petitioners here), Appendix B, *infra*, p. 40b-41b, to respondents' (Appellants below), Appendix B, *infra*, p. 41b.

("D-a"—Vol. I or II, means APPENDIX FOR APPELLANTS, Respondents here; "P-b" means BRIEF FOR RESPONDENTS, (plaintiffs), Petitioners here.)

STATEMENT OF THE CASE.

The action was for libel by Petitioner, the plaintiff, Howard J. Theckston (Clerk of the Camden County District Court), for series of libels, which plaintiff contended were not only "false and highly defamatory of him" (D 38a:38; Pb 7:22), but published with "actual malice", in sensational and inflamatory manner, subjecting him to number of investigations (in all of which he was cleared) and violent public reactions, and affecting him deeply, published by Respondents here, the defendants, Triangle Publications, Inc., (owner and publisher of THE PHILADELPHIA INQUIRER), and Dennis M. Higgins (its reporter), as a feature and heart-rending sob story about an alleged orderly behaved Puerto Rican "MOTHER OF 5 JAILED IN CAMDEN WHEN 'FREE SPEECH' IRKS AIDE" (plaintiff-court clerk), without cause, at direction of plaintiff, "a minor official", and "Her young five (who were non-existent) children were left at home with no one to feed or care for them"; and

Also action by Caroline Theckston (Clerk's wife) for loss of consortium.

Truth was neither pleaded, nor an issue. (D 18a:26a:10 Item 7.)

Plaintiffs filed complaint based upon 6 publications (Appendix C, *infra*, pp. 2c-10c, being Exhibits P1 to 6, treated jointly at trial) and by plaintiff's wife for loss of consortium.

There was a trial for 38 days over a 10-week period before County Court Judge Alexander C. Wood, III, with a jury, at Mt. Holly, resulting in jury verdicts of $60,000.00 compensatory damages for plaintiff Howard J. Theckston and $20,000.00 for plaintiff Caroline Theckston.

There was a motion by Respondents (defendants) for a new trial on the grounds that each verdict was contrary to the weight of the evidence, excessive and contrary to law, which motion was denied and Judge Wood filed *Conclusions* (opinion). (D I 32a:1; Pb 3:30-8:27) (Appendix B, *infra*, pp. 7b-16b).

There is a wide disparity between the facts as stated by the Appellate Division and the Trial Judge, which accentuates question raised about State Appellate Court examining the *"whole record"*, otherwise how account for it?

The Appellate Division said—

> "the factual misstatements are incidental and do not go to the heart of the alleged libel. The thrust of plaintiffs' complaint is that the newspaper accounts were slanted and presented an unfair picture of what really happened. Actually, we do not have so much a case of factual falsity as one of impartial reporting and fair editorial comment." (Appendix B, *infra*, p. 5b.)

However, the trial court characterizing all the voluminous testimony taken before him, said (D I 38a:5-9; or Pb 6:30-34) (Appendix B, *infra*, 13b):

> "The jury could find that there were numerous factual falsities in the oft-repeated newspaper accounts. * * * they could find falsity in the entire

recital of those facts and the characterizations of the plaintiff drawn therefrom."

(D I 38a:33-39a:1-13; or Pb 7:16-36) (Appendix B, *infra*, 14b):

"* the paper chose to present an account of the arrest of a person charged with disorderly conduct in what the jury could find was a grossly distorted manner, with the object of portraying the plaintiff as a despotic and arrogant person (to use two of defendants' own adjectival characterizations). The jury could further find that such portrayal was false and highly defamatory of the plaintiff.

"Moreover, the Court feels that there was ample evidence not only of the defamatory character of the publications, but also that they were indeed published with 'actual malice' in the *New York Times* sense. There was, to be sure, some investigation before the story was written, but it was at best desultory and haphazard. No real effort was made to check with eye witnesses other than Mrs. Agin, and no inquiry was made as to her motives although there was evidence from which it could be concluded that she was a bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior."

* * * * * *

"Clearly the jury could find that these stories, if not willfully false were published with reckless disregard of whether they were false or not." (D I 39a:33-35; or Pb 8:15-18.)

(D I 39a:36-40a:13) (Appendix B, *infra*, 15b):

"I am of course aware that the United States Supreme Court indicated in *New York Times Co.* v. *Sullivan, supra*, that a newspaper is not required to

guarantee the absolute correctness of all its facts. But this is not to say that a newspaper has no duty to check its facts or that it may ignore or even avoid obvious areas where this should be done.

"The continuing barrage of repetition of the account of the incident, which followed the initial publication, is further evidence, if that be needed, from which the jury could infer actual malice. It might well be concluded that the defendants were attempting to make a sensational story regardless of the true situation and regardless of the catastrophic effect on the reputation of the plaintiff.

• • • •

(D I 40a:34-37)

"In this case, the jury was charged as to the constitutional standard laid down in *New York Times*. The jury rendered its verdict in the light of that charge and there was evidence to support that finding."

The President of the Camden County Bar Association, Neil Deighan, Jr., in announcing investigating committee, as reported in Inquirer of October 2, 1963, said (*Ex* P-4):

" 'many of the practicing attorneys were astounded and shocked' at the disclosure of Theckston's actions.

" 'My personal reaction to the reported stories and editorial in The Inquirer is that this incident is either a gross infringement on civil rights or one of the worst and most distorted newspaper reports I have seen.' "

The basic story of the libels appeared in *Ex P-1* (Appendix C, *infra*, p. 2c), in the issue of The Philadelphia Inquirer of Monday, September 30, 1963, (one week after the event), page 1, center, with bold headline reading, *"MOTHER OF 5 JAILED IN CAMDEN WHEN 'FREE SPEECH' IRKS AIDE"*. It was not a developing or

"hot" story requiring immediate publication. It was one week after the event and "stale", with no need for immediate publication. There was ample time to interview Mrs. Buridrogo, the Puerto Rican woman. It was contended and jury could find that defendants deliberately stalled and delayed interviewing her until after publication, because it would eliminate this sensational sob story, which editors had already decided was "a very good story" before they knew the details or had even heard from defendant-reporter. (Pb 14-18.)

The investigation they conducted into arrest by their regular Camden reporter, Harry Potter, showed that when she was arrested, her "Condition" was "Drunk" and the "Charge" was "Disorderly Conduct". (*Ex P 21A;* D II 437a:4-39; 438a:1-32), (Appendix C, *infra,* p. 1c.) This was not published, nor the fact that she pleaded guilty next morning and apologized to Mr. Theckston for the trouble she caused him. In other words, defendants knew that the feature-story, in essence, was false: She was drunk and disorderly in the District Court office and she had no 5 young children, and the story as published was a fictionalized and false version of what took place.

Admittedly, "Mother of 5" was false. She was only the mother of a grown son, 21 years of age, and who was employed and supported her.

It was an emotional human-interest story and the theme was how this proud American-citizen "MOTHER OF 5" from Puerto Rico, came to the court as a self-appointed interpreter for her Spanish speaking countryman to help him with his case in District Court, how her constitutional right of "Free Speech" was shattered because of plaintiff's annoyance with the Spanish-speaking woman and her tone of voice, and that as a reward for her troubles she wound up "in jail on disorderly conduct charges pressed by a minor official with whom she quarreled. Her 5 children were left at home with no one to feed or care for them."

The story proceeds with a sub headline that the (5 children) were "LEFT WITHOUT FOOD"; that "these particular free Americans (office employees) wouldn't stand for it. They told the Inquirer of the injustice." This too is a false statement because the defendants' sole informer was the "bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior." (Pb 7:30 to 36.) She was the family friend of the defendant-reporter and the newspaper executives knew of this relationship and raised question concerning it only from the defendant-reporter involved.

The story contained the incredulous tale of an unknown City Hall operator telling the defendant-reporter on Saturday night when the switchboard was closed, about "one of the Buridrogo youngsters of 'RANSOM OFFERED' (and other subheadline) "of '$25 from the rent money' and 'can I have my mother back?' "

This was a pure fabrication, as testified to by the telephone operator and even indicated by their regular Camden reporter. (Pb 11 and 12.)

First, there were no Buridrogo youngsters: there was only the grown son of 21 years of age who was working at the time. Moreover, to show the utter irresponsibility of the newspaper in the accuracy of their reporting, by their subsequent articles even the fictitious number of children kept diminishing day by day.

There was also a reference in the story to a memorandum given by the plaintiff to the office employees, which was referred to in the story but it was contended at the trial that this was a minor part of the story, and that the main and predominating feature of the story which attracted the readers was about the jailing of this well behaved Puerto Rican woman whose only "offense" (?) was speaking in loud tone of voice and thereby annoying clerk in helping Spanish speaking countryman involved in court action, and leaving her 5 young children at home with no

one to feed or care for them. This immediately appealed to the editorial staff as "a very good story", before they knew any details about it and before they even heard from the reporter. (Pb 14-18.) The story attracted "wide public interest", manifested "by telephone calls, people calling in person and writing in, people whose comments ranged completely against Theckston in their criticism". (Pb 19:1-5.)

There was no defense of Truth.

REASONS FOR GRANTING THE WRIT.

This case is wholly unlike the other libel actions before the Court since *New York Times:* In the other cases only one article or publication was involved, while in this case a series of newspaper articles were involved almost day-in and day-out for weeks, repeating, in substance or in part with new flourishes, the first false and reckless page 1, feature story about "Jailed Mother of 5", Ex. P-1, and sharp editorial calling for investigation and discharge of the plaintiff as clerk of the court.

The Trial Judge stated,

> "The jury could find that there were numerous factual falsities in the oft-repeated newspaper accounts. But more important, they could find falsity in the entire recital of those facts and the characterizations of the plaintiff drawn therefrom. The whole thrust of the articles was to present the plaintiff to readers of the paper as an arrogant tyrant who trampled on the rights of innocent persons who had business with the court, and who wrongfully attempted to suppress legitimate criticism of his actions, whereas the jury could have found that the plaintiff did no more than to take perfectly logical action to seek the assistance of the authorities in dealing with a person who was indeed disorderly and

creating a considerable disturbance in his office." (D I, 38a:5-18.)

"There was, to be sure, some investigation before the story was written, but it was at best desultory and haphazard. No real effort was made to check with eye witnesses other than Mrs. Agin, and no inquiry was made as to her motives although there was evidence from which it could be concluded that she was a bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior." (D I, 39a:6-13.)

"The continuing barrage of repetition of the account of the incident, which followed the initial publication, is further evidence, if that be needed, from which the jury could infer actual malice. It might well be concluded that the defendants were attempting to make a sensational story regardless of the true situation and regardless of the catastrophic effect on the reputation of the plaintiff." (D I 40a:5-13.)

(Appendix B, *infra*, pp. 13b, 14b, 15b.)

Examination of the "entire trial record" would demonstrate this, the diminutive printed record may not. It is contended that even the printed record supports the Trial Court's factual findings as stated in Petitioners' Brief (designated "BRIEF FOR RESPONDENTS" before State Supreme Court and Appellate Division, pp. 10-28, coupled with "APPENDIX FOR RESPONDENTS".)

The greatly abbreviated testimony established a sufficient prima facie issue for the jury under *New York Times* of convincing clarity under the alternative part of the rule that the defamatory statements were made with reckless disregard of whether they were false or not. It seems that the State Appellate Courts misunderstood and misapplied the nature and extent of the "actual malice rule" and construed it so rigidly and narrowly that it predicated liability only

on pre-publication actual knowledge, and even that so stringent that it amounted to "absolute privilege".

In *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), 88 S. Ct. 1323, 20 L. ed 2d 262, this Court reversed a plaintiff's judgment because the rule was misunderstood and applied by the State Court, and by the same token there should be a reversal where the rule was misunderstood and applied by the State Appellate Courts in reversing plaintiffs' judgments based upon jury verdicts on sufficient evidence in long trial strictly and carefully tried within the rule. And this was done without "the whole record" of the trial being before the Appellate Courts, in conflict with the rule of *Beckley Newspapers Corporation* v. *Hanks*, 389 U. S. 81, 88 S. Ct. 197 (1967), 19 L. ed 2d 248, where this Court repeatedly said that it can only be done upon "an independent examination of the record as a whole".

(Volumes I and II—"APPENDIX FOR APPELLANTS", Respondents here.)

The effects on Petitioner were devastating. Mrs. Thecksston testified that she and her husband (Petitioners) "just stopped going out (from shame and humiliation). It was just three lost years, believe me." (D I 157a:29-30.)

The decision of the State Appellate Court virtually emasculates protection of reputation and position of the lower-echelon official—the little man in the public official field—the "minor official"—(as the Respondents repeatedly referred to the Petitioner throughout the series of articles) —and subjects him to loss of position and livelihood by false defamatory and reckless statement, without the ability and capacity of public officials in higher echelons to fight back, defend and protect themselves.

The contest between Petitioner and the Respondent to save his reputation and job was one-sided—the minor court clerk against the newspaper was ill-matched: A powerful metropolitan newspaper with a daily circulation in excess of 600,000 and over a 1-million readers vs. "a minor court

clerk". The clerk was crushed in his reputation and mental suffering and has never recovered from the attacks, although ultimately exonerated by all agencies.

Despite this uneven contest, the State Appellate Courts in its said narrow and rigid overconstruction of the rule, not only reversed the judgments on the small, partial record for insufficiency of evidence, but directed final judgment to be entered for Defendant-newspaper without even remanding case for re-trial or further proceedings not inconsistent with opinions, which this Court has done in applicable cases.

The test as laid down by this Court in *New York Times* and *Beckley Newspapers Corp.* v. *Hanks,* cited by Appellate Division, and related cases, is that the Appellate Court undertakes "an independent examination of the record as a whole", which was conceded by the Respondents (defendants) (Db 17:15; 37; 18:2). The Appendix filed by Respondents (defendants) only contained a small part of the trial record to which Petitioners (plaintiffs) objected and counter-questioned that Appellate Court should therefore dismiss appeal, etc. (See Counterstatement of Questions Involved, Pb 1 (a, b, c)). (Appendix B, *infra,* pp. 40b-41b).

The Appellate Division did say in its opinion that they examined "the whole record" but the "whole record" was not before it, only the printed Appendix of Respondents (defendants), 566 pages,—and not the entire typewritten record consisting of about 4,500 pages, and *only* the diminutive printed record was before the State Supreme Court.

The "actual malice" rule in *New York Times* was considered and interpreted by this Court in *Curtis Publishing Company* v. *Butts, Associated Press v. Walker,* 388 U. S. 130, 87 S. Ct. 1975, 18 L. ed 2d 1094, decided June 12, 1967.

In *Curtis Publishing Company,* the second type of "reckless falsehood" has been clarified and somewhat delineated, and Mr. Justice Harlen joined by 3 Justices said:

"The evidence on the preparation of the article, on which we shall focus in more detail later, cast serious doubt on the adequacy of the investigation underlying the article."

The State Appellate Courts seemed to feel that even though, as found by the Trial Judge, "the newspaper's investigation of the story prior to publication (was) at best desultory and haphazard", and the newspaper failed "to inquire as to possible motive of the employee in the District Court Clerk's Office who first alerted the newspaper to the incident," and the "fact that the plaintiff was given no *bona fide* opportunity to tell his version of the story", that this did not satisfy the said test of "actual malice", and that "mere negligence" was constitutionally insufficient to show the recklessness that is required for a finding of "actual malice", under *New York Times.*

However, in *Curtis Publishing Company,* here are a few quotes of what the Justices of this court and also the Chief Justice regarded as tantamount to "reckless falsehood":

Mr. Justice Harlan said (under V):

"The *Butts* jury was instructed, in considering punitive damages, to assess 'the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions.' These considerations were said to be relative to a determination whether defendants had proceeded with 'wanton and reckless indifference'. In this light we consider that the jury must have decided that the investigation undertaken by the Saturday Evening Post, upon which much evidence and argument was centered, was grossly inadequate in the circumstances.

* * * * * * *

"Given the extended history of the case, the amount of evidence pointing to serious deficiencies in investigatory procedure, and the severe harm in-

flicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of 'truth', or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude towards Butts rather than on Curtis' conduct.

"The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. * * *."

Mr. Chief Justice Warren, concurring in result, said (at end of opinion):

"The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of Mr. Justice Harlan. Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article. This knowledge was signaled by the statements at the conclusion of the article that 'Wally Butts will never help any football team again' and 'careers will be ruined, that is sure'.

"I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times* and *Garrison*. Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers."

What Mr. Chief Justice Warren and Mr. Justice Harlan said about the Saturday Evening Post might well be applied to The Philadelphia Inquirer in this action.

It is submitted that the State Appellate Courts gave the rule a too rigid and narrow construction which appears to be contrary not only to *New York Times Co.* and *Curtis Publishing Co.* v. *Butts,* but also to the recent opinion in *St. Amant* v. *Thompson,* 390 U. S. 727, (1968) 88 S. Ct. 1323, 20 L. ed 2d 262 (1968), in which Mr. Justice White said:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified annonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

Almost prophetic was the language of the Trial Judge, Judge Wood, who pointed out in his "Conclusions" denying motion for new trial, substantially the same facts present in the case of Petitioners within said guide lines.

He wrote his Conclusions prior to April 28, 1967 (Vol. I, 42a:21), and *Butts* and *St. Amant* were decided thereafter, namely, June 12, 1967 and April 29, 1968, respectively.

The State Appellate Courts' reversal has applied the *New York Times* rule with such rigor and minimization of the disputed facts as found by the Trial Judge and Jury who heard the case, that it is urged that it has gone beyond the

boundaries laid down by this Court in this class of cases and virtually deprived "public officials" and "public figures" of libel protection and redress. See dissenting opinion of Justice Fortas, in *St. Amant* that . . .

> "The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open-season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living."

And this in a case where the Trial Judge tried the case strictly in accordance with the letter and spirit of the *New York Times* rule, and where he ruled on plaintiff's evidence strictly therewith, but granted defendants widest latitude as the "whole record" would show. Most of the rulings were for defendants and to such an extent they only alleged on appeal one question of evidence in this very long trial.

It also involves substantial error and unusual step by the Appellate Courts in setting aside with finality verdict of jury, with remand to enter judgment for defendants (which petitioners contend established substantial jury issue of "*New York Times* malice"), where trial court, in carefully considered opinion (D I:32a; Pb 3:32-8:27) denied motion for new trial because alleged to be contrary to evidence and weight thereof, which finality does not appear to have been ordered by United States Supreme Court in *New York Times Co.* and related cases, and even then only reversed "*on the record as a whole*" in those cases, and remanded the case for further proceedings not inconsistent with opinion.

Appellate Courts stated that plaintiffs had not "challenged the trial court's ruling that Theckston was a public official and subject to the rule enunciated in *New York Times* v. *Sullivan, supra*".

Plaintiffs objected to this ruling from the beginning through the end of this long trial (Pb 34:7-10); and also to the charge concerning same: (D II 542a:38 to 543a:27, exceptions trial transcript November 28—December 2, 1966, pages 450:18-452:18-22).

Mr. Justice Brennan in *New York Times* indicated in footnote 23 in his opinion that they had "no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. (Cit.) Nor need we here determine the boundaries of the 'official conduct' concept. * * *." Also footnote 13 in *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 S. Ct. 669, 15 L. ed 2d 597 (1966).

Throughout the newspaper articles in suit, they referred to the plaintiff as "a minor official".

This, too, should have been considered by the Appellate Courts when they undertook to pass upon the sufficiency of proofs required by the *New York Times Rule* despite the abbreviated trial record to which continuous objections had been made.

The Petitioners objected when they received the abbreviated Appendix of the Respondents, as Appellants, of about 1/9th of the trial record, that this made rule of "whole record" in *New York Times* and *Beckley Newspapers* virtually inoperative. Petitioners raised the questions in Counterstatement and Brief (Pb 1, 3:1-23; 8:28 - 10:8) and therefore suggested that the Trial Court's opinion on defendants' (Respondents') motion for new trial should be considered in view thereof. Moreover, in the interest of expedition, Petitioners took position that even if the Appellate

Courts should only examine the printed appendices of both defendants and plaintiffs, they would show that there were sufficient proofs to create jury issue under and as required by the *New York Times* rule.

We referred herein to statement by Mr. Justice White as to fabrication of a story, product of imagination, doubt of veracity of informant or accuracy of his reports, etc., as evidence of the required *New York Times* actual malice, as well as the wholly shallow, and what might be termed spurious, investigation by the defendants (Respondents) of the true facts in this week-old story of a "stale nature." There were conflicts in testimony.

The Appellate Courts seemed to have considered plaintiff's note to his office employees as the paramount thing, but the record of the entire case will show that this played a minor role: It is respectfully suggested that this was the function of the jury to determine from the reading of all the publications and the testimony what was the paramount thing that readers derived from the publications, whether the false sob story was the thing or whether is was the note. It will be readily conceded that the publications constituted essentially "a sob story", and certainly there was nothing about the note to the employees that made it "a sob story."

In the cases decided by this Court where the judgment was reversed, it is suggested that it was, *inter alia,* because charge to jury was questioned, and the case was remanded to the Trial Court "for further proceedings not inconsistent with this opinion". But in this case the Appellate Courts decided with finality that the judgment be reversed and the matter remanded for entry of a judgment in favor of defendants, because as a matter of law evidence was insufficient, and this despite the fact, that the charge of the Trial Court was flawless on the Rule, there was considerable evidence of "actual malice" by recklessly false statements of conflicting character with impeccable *New York Times Rule* charge and jury after long trial and what appeared to be

careful and responsible deliberations, brought in verdicts for Plaintiffs.

This Court has stated that the outer limits of "reckless disregard" "cannot be fully encompassed" in one infallible definition. Inevitably its outer limits will be marked out by case-to-case adjudication * * *." (*St. Amant*)

The Appellate Courts take a partial statement from *Garrison* v. *Louisiana,* by Mr. Justice Brennan, that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." But Mr. Justice Brennan then stated "The use of calculated falsehood, however, would put a different cast on the Constitutional Question", and referred to the honest, but inaccurate utterance, and stated that "it does not follow that the lie, knowingly and deliberately published about a public official should enjoy a like immunity"; and about "those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant * * * * *. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protectection."

And here, it is suggested that the New Jersey Appellate Courts fell into egregious error and eliminated the alternative or 'reckless' part of the Federal rule that was laid down in *New York Times,* and reversed the judgment herein apparently on only the first part of the rule, namely, 'knowing falsehood' when it said, "where public officials are concerned, it is only a calculated falsehood which will afford redress."

Then followed a reference in opinion of State Court about what this Court said concerning fortitude of judges applying to other government officials; and cited *Beckley Newspapers Corp.* v. *Hanks,* and the Appellate Court then concluded by reversing, and remanded the matter for entry of judgment of favor of Defendants.

In other words, it is suggested that the New Jersey Appellate Courts have decided that case not in accord with the Federal Constitutional rule laid down in *New York Times* and the applicable decisions that followed, and swept away the broad area of reckless disregard of truth, which is suggested to be the major part, because of the practical and realistic difficulty in probing into the minds of the newspapermen that they actually knew that the statements were false beforehand when they composed and published same.

No where in the opinion does the Court refer to 'reckless falsity' except to mention it as part of the test of 'actual malice', as this Court stated in *New York Times,* and that the measure of proof is convincing clarity. All references to the meager facts set forth in the opinion are measured against "factual falsehoods", and are not measured against the important alternative co-equal standard of this Court, namely statement made with "reckless disregard of whether it was false or not."

Moreover, may it be pointed out that the constitutional standard established by the Court was clearly in accordance therewith and jury had it with them during deliberation in memorandum form (Appendix A, *infra,* p. 37b).

It is submitted that were it not for the misunderstanding and misapplication of the actual malice standard by the State Appellant Courts, there was a sufficiency of evidence to go to the jury on the alternative rule of reckless disregard of truth, this is substantially the only error complained of by the defendants-respondents, the decision of the New Jersey Appellate Courts should be reversed, and the judgments based upon the verdicts of the jury in the trial of Law Division should be reinstated.

The verdict for the plaintiff-petitioner was based upon our claim for damages for loss of consortium and is derivative from the claim of plaintiff husband, involves no Federal Constitutional Question and neither do her damages.

We have argued that the New Jersey Court did not consider the alternative actual malice reckless disregard rule. Even if we are wrong in this, we contend that the decision calls for re-examination and reversal because the reversal by the New Jersey Court was not based upon the examination of the trial record as a whole as laid down in the decisions of this Court, namely: *New York Times Co.* v. *Sullivan, Garrison* v. *Louisiana, Curtis Pub. Co.* v. *Butts, Associated Press* v. *Walker, Beckley Newspapers Corp.* v. *Hanks,* and *St. Amant* v. *Thompson.*

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

HARRY GREEN, ESQ.,
Attorney for Petitioner,

HOWARD J. THECKSTON.
and
SIDNEY W. BOOKBINDER, ESQ.,
Attorney for Petitioner,
CAROLINE H. THECKSTON.

JOHN S. FIELDS, ESQ.
of Counsel

Appendix A.

CONSTITUTIONAL PROVISIONS.

CONSTITUTION OF THE UNITED STATES.

* * * * *

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B.

HOWARD J. THECKSTON, ET AL., PLAINTIFFS-PETITIONERS, v. *TRIANGLE PUBLICATIONS, INC., ET AL.*, DEFENDANTS-RESPONDENTS.

52 N. J. 173

On petition for certification to Appellate Division, Superior Court.

See same case below: 100 *N. J. Super.* 452.

Mr. Harry Green and *Mr. Sidney W. Bookbinder* for the petitioners.

Messrs. Powell & Davis for the respondent.

July 8, 1968. Denied.

HOWARD J. THECKSTON AND CAROLINE THECKSTON, PLAINTIFFS-RESPONDENTS, v. TRIANGLE PUBLICATIONS, INC., A CORPORATION OF DELAWARE, AND DENNIS M. HIGGINS, DEFENDANTS-APPELLANTS.

100 N. J. Super. 452

Superior Court of New Jersey
Appellate Division

Argued March 25, 1968—Decided April 25, 1968.

SYNOPSIS

Libel action by court clerk and his wife against newspaper publisher and reporter on account of articles and editorials highly critical of clerk's handling of incident in his office and his issuance of memorandum threatening discharge of critical employee. The Superior Court, Law Division, rendered judgment for plaintiffs, and defendants appealed. The Superior Court, Appellate Division, Sullivan, J. A. D., held that evidence was insufficient to take case

to jury for lack of proof of actual malice or reckless disregard of falsity, granted that publication lacked quality of impartial news reporting.

Reversed and remanded.

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1. Libel and slander ⇐123(6)

Evidence in action by court clerk against newspaper on account of articles and editorial critical of clerk's handling of incident in his office and his memorandum threatening to discharge critical employee was insufficient to take case to jury for lack of proof of actual malice or reckless disregard of falsity, granted that publication lacked quality of impartial news reporting.

2. Libel and slander ⇐51(5)

Test of liability for defamation of public official is actual malice, that is, knowledge that publication was false, or reckless disregard of truth.

3. Libel and slander ⇐112(2)

Measure of proof of malice or reckless disregard of truth in defamation action by public official is convincing clarity.

4. Constitutional law ⇐274

Mere negligence in failing to discover misstatements is constitutionally insufficient to show recklessness that is required for finding of actual malice in defamation of public official. *U. S. C. A. Const. Amends.* 1, 14.

5. Libel and slander ⇐51(5)

Speech concerning public affairs is essence of self-government so that, where public officials are concerned, it is only calculated falsehood which will afford redress.

Before Judges SULLIVAN, FOLEY and LEONARD.

Mr. Louis G. Hill, member of the Pennsylvania Bar, argued the cause for appellants (*Messrs. Powell & Davis,* attorneys; *Messrs. Dilworth, Paxson, Kalish, Kohn & Levy,* members of the Pennsylvania Bar, attorneys).

Mr. Harry Green argued the cause for respondent Howard J. Theckston.

Mr. John S. Fields argued the cause for respondent Caroline Theckston (*Mr. Sidney W. Bookbinder,* attorney).

SULLIVAN, J. A. D. Plaintiffs Howard J. and Caroline Theckston brought this libel suit against Triangle Publications Inc., publisher of the *Philadelphia Inquirer,* and Dennis M. Higgins, a reporter on the staff of the newspaper. After a 36-day trial, the jury returned a verdict for $60,000 compensatory damages in favor of Howard J. Theckston, Mrs. Theckston was awarded $20,000 additional damages for loss of consortium arising out of the libel.

Mr. Theckston is the clerk of the Camden County District Court. The charge of libel is based on a series of newspaper articles and an editorial appearing in defendants' newspaper concerning two incidents which took place in the District Court Clerk's office.

The first involved a Puerto Rican woman who had appeared at the District Court Clerk's office in connection with a dispossess suit and who had been arrested as disorderly on Theckston's complaint, forcibly removed from the clerk's office and jailed. On the following morning the woman pleaded guilty to a disorderly person charge and was sentenced to pay a fine of $25 and costs or serve 15 days in jail. Not being able to raise the money immediately, she was remanded to jail where she remained four days until her son paid the fine and costs.

The second involved a memorandum issued two days after the first incident to personnel in the District Court Clerk's office. In it Theckston stated that it had been

brought to his attention that some employees had publicly criticized his actions. The memorandum warned employees that Theckston would brook no interference with his administration of the affairs of the clerk's office and that if there should be a recurrence, he would take immediate action to dispense with the services of the person responsible.

As a result of the foregoing the newspaper wrote a series of articles and an editorial highly critical of Theckston's handling of the first incident and his issuance of the intra-office memorandum.

Theckston's contention is that these publications contained inaccuracies and were slanted against him so as to produce a distorted picture of what really happened. He alleges that his version of the first incident was not fully presented by the newspaper, and the report of the so-called interview with him was written in tongue-in-cheek style. He also charges that newspaper characterizations of his conduct and actions were so extreme and unfair as to exceed the admittedly wide latitude allowed a newspaper in reporting on the official conduct of a public official.

Defendants contend that plaintiffs failed to make out a jury issue of liability within the meaning of *New York Times Co.* v. *Sullivan*, 376 *U. S.* 254, 84 *S. Ct.* 710, 11 *L. Ed. 2d* 686 (1964), or that at least the jury verdict as to both liability and damages was contrary to the weight of the evidence.

We have examined the whole record to ascertain whether plaintiffs have presented a jury issue of liability within the framework of the rule laid down in *New York Times Co.* v. *Sullivan*. We conclude that defendants' motion for a dismissal of the complaint made at the close of the evidence should have been granted.

New York Times Co. v. *Sullivan*, held that there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and

sometimes unpleasantly sharp attacks on government and public officials. The court noted that a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited to amount—leads to a comparable self-censorship in violation of the First and Fourteenth Amendments. The proper rule to be applied under the constitutional guarantees, said the court, was one which prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. One seeking to prove actual malice, added the court, must do so with the convincing clarity which the constitutional standard demands. (Plaintiffs have not challenged the trial court's ruling that Theckston was a public official and subject to the rule enunciated in *New York Times Co.* v. *Sullivan.*)

[1] Applying the foregoing rules to the record before us, we conclude that a *prima facie* case of liability was not proved. It is to be noted that *New York Times Co.* v. *Sullivan* dealt with a case involving a publication which contained material factual falsehoods. Even then the broad rule of immunity set forth above was held to apply.

Here the factual misstatements are incidental and do not go to the heart of the alleged libel. The thrust of plaintiffs' complaint is that the newspaper accounts were slanted and presented an unfair picture of what really happened. Actually, we do not have so much a case of factual falsity as one of impartial reporting and fair editorial comment.

The trial judge characterized the newspaper's investigation of the story prior to publication as at best desultory and haphazard. He concluded that this, together with the failure of the newspaper to inquire as to possible motive of the employee in the District Court Clerk's office who first alerted the newspaper to the incident, as well as the "fact that the plaintiff was given no *bona fide* opportunity to tell

his version of the story", satisfied the requirement of proof of actual malice.

[2-4] As heretofore noted, the test is actual malice—that is, knowledge that the publication was false—or reckless disregard of whether it was false or not. The measure of proof is convincing clarity. Mere negligence in failing to discover misstatements is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. *New York Times Co.* v. *Sullivan, supra.* It is on this score that we conclude that plaintiffs failed to establish a *prima facie* case of liability. *Baldine* v. *Sharon Herald Co.*, 391 *F.* 2*d* 703 (3*rd Cir.* 1968).

[5] Defendant newspaper had received a lead on a story concerning the alleged abuse of his office by plaintiff. Defendant Higgins was assigned to the story. He made a routine investigation of the incident and interviewed a number of persons, including Theckston. As a result, the publications, highly critical of Theckston's actions, appeared. (As heretofore noted, the publications included a report of a telephone interview with Theckston in which he gave his version of why he had the woman arrested.) Granted that the publications lacked the quality of impartial news reporting, we fail to see how it adds up to a showing by convincing clarity of actual malice. Speech concerning public affairs is the essence of self-government so that, where public officials are concerned, it is only the calculated falsehood which will afford redress. *Garrison* v. *State of Louisiana*, 379 *U. S.* 64, 85 *S. Ct.* 209, 13 *L. Ed.* 2*d* 125 (1964).

In *New York Times Co.* v. *Sullivan, supra,* the Supreme Court referred to its prior holdings that criticism of a judge or his decision, even though the utterance contain "half truths" and "misinformation," does not justify the punishment as criminal contempt; the court adding that if judges are to be treated as men of fortitude, able to thrive in a hardy climate, surely the same must be true of other government officials.

Beckley Newspapers Corp. v. *Hanks*, 389 *U. S.* 81, 88 *S. Ct.* 197, 19 *L. Ed.* 2d 248 (1967), is a recent decision involving a court clerk who had recovered a libel judgment against a newspaper for a series of articles written on fluoridation of the local water supply. One article had accused the clerk of ordering over the telephone that he did not want his name to appear in the newspaper again and added "He backed up this order with an explicit threat—one merely intended to frighten those who are easily intimidated." The article also stated that "The only conclusion to which we can come is that either Hanks or Mrs. Hurt (President of the County Board of Health) have been in league towards the fanatic end, believing all the wild-eyed ravings against fluoridation despite decades of experience to disprove them or that perhaps his blustering threats were able to intimidate the lady." In a *per curiam* opinion, the Supreme Court unanimously reversed the libel judgment, holding that the evidence presented to show actual malice lacked the convincing clarity demanded by the constitutional standard and was insufficient to present a jury question.

The judgment herein is reversed and the matter remanded for entry of a judgment in favor of defendants. No costs on this appeal.

CONCLUSIONS OF TRIAL JUDGE ON NEW TRIAL.

APPEARANCES:

For the Motion: *Messrs. Powell & Davis, (Mr. James M. Davis, Jr.,* appearing) attorneys for defendants, (Mr. Louis G. Hill, of the Pennsylvania Bar, was admitted *pro hac vice* to argue the motion on behalf of defendant Triangle Publications, Inc.)

Contra: *Mr. Harry Green,* attorney for plaintiffs

WOOD, A. C., J. C. C.

The plaintiffs instituted this action for libel against defendant Triangle Publications, Inc., publisher of the daily newspaper, the Philadelphia Inquirer, and against Dennis

M. Higgins, a reporter for said newspaper. The action is based upon a series of articles which appeared in the Philadelphia Inquirer between September 30 and October 4, 1963. The jury, following a ten-week trial, returned a verdict in favor of the plaintiff Howard J. Theckston for the sum of $60,000.00 compensatory damages and in favor of the plaintiff Caroline H. Theckston, for the sum of $20,000.00 compensatory damages. The jury expressly declined to award punitive damages.

The defendants now move for a new trial, upon the grounds:

". . . that each of the verdicts . . . was contrary to the weight of the evidence, that each of said verdicts was excessive and unreasonable in amount, and that each of said verdicts was contrary to law."

The publications complained of consisted of certain news articles, an editorial, and certain "letters to the editor," all concerning the conduct of the plaintiff Howard J. Theckston in connection with the arrest and confinement of one Margarita Buitrago for alleged disorderly conduct in the office of the Clerk of the Camden County District Court on September 23, 1963. Plaintiff Howard J. Theckston was then and still is Clerk of that Court.

A brief review of the facts giving rise to the disputed publications follows:

On the afternoon of Monday, September 23, 1963 the plaintiff Howard J. Theckston was routinely performing his duties in the office of the Clerk, situated on the third floor of the Camden County Court House, which building also serves Camden as its City Hall. A reception area is separated from the working area of the office by a fair-sized counter.

On the afternoon in question, a man and a woman (subsequently identified as Mr. Molina and Mrs. Buitrago entered the office. Almost at once Mrs. Buitrago started to

talk in a loud and strident voice. Mr. Theckston and several other witnesses described it as shouting. Nevertheless, it was apparently made clear that Mr. Molina had a question about a landlord and tenant action in which he was the defendant, that he spoke very halting Eglish, and that Mrs. Buitrago said she was there to "interpret" for him. According to the witnesses for the plaintiff, Mrs. Buitrago refused to quiet down, although requested a number of times to do so. At length Mr. Theckston, according to his own testimony, warned Mrs. Buitrago that if she would not be quiet he would call the police; whereupon she told him to "go ahead." Theckston did call the police and Officers Jerome Spratley and Daniel Domeraski responded to the call. The officers testified that on their arrival the woman was talking loudly and "gesticulating." Officer Spratley asked Mr. Theckston what he wanted and Theckston replied that he just wanted the woman removed from his office. The officers then informed Theckston that if he wanted the woman forcibly removed it would be necessary for him to "sign a complaint" against her. Mr. Theckston replied that he would do so. The officers requested Mrs. Buitrago to leave and she refused. They then took her by the arms and attempted to escort her from the office. She resisted by sitting on the floor, and the policemen dragged her, screaming and crying, out of the Clerk's office and some distance down a corridor to a police elevator, by which means she was taken to Camden City Police Headquarters, where she was booked and Theckston signed a Municipal Court complaint charging her with violation of the Disorderly Persons Act. She refused at that time to give her name and was committed to the County Jail overnight on a "temporary commitment order" issued by the police desk sergeant. She continued to resist and was again physically dragged to the elevator by which she was transported to the County Jail on the sixth floor of the building.

The next morning, Tuesday, September 24, she was taken before the Camden City Municipal Court, where she pleaded guilty to the disorderly conduct charge. The Magistrate,

after hearing a brief statement by Mr. Theckston (it is not clear whether or not Theckston was sworn as a witness) imposed a fine of $25.00 and $5.00 costs and in default thereof ordered her committed to the County Jail for 15 days. She remained in jail until Friday, September 28, when she was released on payment of the fine and costs by her son Herman Hernandez.

The incident in the Clerk's office was witnessed by employees present at the time, and the aftermath was known to them. There was discussion of the episode among the employees, not all of it favorable to Mr. Theckston. Word that there was *sotto voce* criticism reached him, and on or about Wednesday, September 25, he wrote and caused to be typed and distributed to the employees a memorandum regarding the episode which contained the suggestion that he might arrange for the transfer of "persons who have publicly criticized my actions." The memorandum added the suggestion that if there should be a recurrence, the Clerk would take "immediate action to dispense with the services of the offenders." Theckston testified that his only motive in preparing and distributing this memorandum was to try to get his critics to come forward so he could discuss the matter with them. The defendants, on the contrary, in the news stories and the editorial which are the basis of this action, referred to it as a "threat."

A stenographer in the Clerk's office, Mrs. Ida Agin, who apparently took particular umbrage at the entire affair, communicated with the defendant, Dennis M. Higgins, whose aunt was her friend and whom she knew to be a newspaper reporter employed by the Philadelphia Inquirer. Higgins discussed the matter with a number of his superiors and made some investigation of the story, as a result of which the series of news articles, the editorial and the "letters to the editor" which are complained of in this suit are published.

The first news article appeared on Monday, September 30, one week following the incident in the Clerk's office. It

was placed on the front page under the two-column headline reading "Mother of Five Jailed in Camden When Free Speech Irks Aide." The second appeared the following morning, October 1, under the headline "Wide Protests Stirred by Jailing of Mother who Annoyed Clerk." In that same issue the leading editorial on the Editorial Page was captioned "Court Clerk's Despotic Arrogance." The editorial in its entire tone and content was scathingly critical of Mr. Theckston. On Wednesday, October 2, appeared a third news story headed "Bar Panel Probes Five-day Jail Term for Mother of Three"; and on Friday, October 4, appeared a fourth article headed "Whitewashing Feared in Mother's Jailing." In that same issue of the paper there were published on the editorial page three "Letters to the Editor," Purporting to be from readers, all of which were likewise critical and condemnatory of the plaintiff. These letters appeared in a single column under the following black-letter heads: "Right of Free Speech," "Petty Tyranny," and "Crying Shame."

The plaintiffs maintained that these articles were factually and in tone and content willfully and maliciously false and defamatory. The thrust of the defense was that they were published in good faith, with honest belief as to their veracity, and were constitutionally privileged, under the standards laid down in *New York Times Company* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710 (1964).

At the outset of the proceedings, the Court determined and ruled as a matter of law that the plaintiff Howard J. Theckston was a public official within the scope and meaning of that term as set forth in *New York Times Co.* v. *Sullivan, supra,* and in *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 699 (1966). The Clerk of the District Court in any county, particularly a county as large as Camden, presides over a sizeable staff and is responsible for the administrative handling of thousands of cases annually. Necessarily, his contacts with the public are numerous and his responsibility for the efficient, fair and impartial conduct of court

business are correspondingly heavy. Although he is not an elected official, the nature of his official duties and their impact upon that very considerable segment of the public who find themselves involved in litigation in the District Court, renders the Clerk quite properly an object of public scrutiny and of public criticism in the conduct of his office.

Accordingly, the jury was charged, in the language of *New York Times* v. *Sullivan, supra,* that the plaintiffs could not recover unless the jury found that the defamatory statements were published with "actual malice"—that is, that they were published with knowledge that they were false or with reckless disregard of whether they were false or not. 376 U. S. at pp. 279, 280; 84 S. Ct. at p. 726.

Moreover, the jury was charged that the burden of proof was on the plaintiffs to prove their case not merely by a preponderance of the evidence but by evidence of convincing clarity—that is, by clear and convincing evidence, cf. *New York Times Co.* v. *Sullivan, supra,* 376 U. S. at pp. 285, 286; 84 S. Ct. at p. 729.

The defendants argue strenuously that the plaintiffs did not sustain their burden of proof—that there was no material falsity, and that, assuming that there was material falsity, the "actual malice" required by the *New York Times* case was not shown.

In considering a motion for a new trial after a jury verdict, the trial court is "forbidden to invade the Constitutional office of the jury by weighing the evidence, where it is fairly susceptible of divergent inferences, and substituting its own judgment." *Hager* v. *Weber,* 7 N. J. 201, 210 (1951); *Kulbacki* v. *Sobchinski,* 38 N. J. 435, 444 (1962). The Supreme Court added, in *Kulbacki* v. *Sobchinski, supra,* at p. 445:

> "What the trial judge must do is canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but to determine whether reasonable minds might accept the evidence

> as adequate to support the jury verdict—or in the language of *Hager,* to determine if the verdict be so far contrary to the weight of the evidence as to give rise to the *inescapable conclusion* of mistake, passion, prejudice or partiality so that it cannot serve to support the judgment * * *.' If reasonable minds might accept the evidence as adequate to support the jury verdict, it cannot be disturbed by the trial court." (Italics supplied.)

Applying the above guide lines, the Court is led inescapably to the conclusion that the present motion must be denied.

The jury could find that there were numerous factual falsities in the oft-repeated newspaper accounts. But more important, they could find falsity in the entire recital of those facts and the characterizations of the plaintiff drawn therefrom. The whole thrust of the articles was to present the plaintiff to readers of the paper as an arrogant tyrant who trampled on the rights of innocent persons who had business with the court, and who wrongfully attempted to suppress legitimate criticism of his actions, whereas the jury could have found that the plaintiff did no more than to take perfectly logical action to seek the assistance of the authorities in dealing with a person who was indeed disorderly and creating a considerable disturbance in his office. It should be remembered, I think, that this office is a public place and the maintenance of order therein is necessary not just for the satisfaction of personal whimsy but for the orderly transaction of all the public business with which it is charged. Falsity may lie not merely in misstatements of fact but in the manner—the "slant" or "light" if you will—in which facts are presented. One only need compare the accounts of many events occurring daily in connection with the present struggle in Viet Nam which emanate from the opposing forces in that struggle to see how differently and to what different ends the same basic facts can be dealt with.

Here the paper chose to present an account of the arrest of a person charged with disorderly conduct in what the jury could find was a grossly distorted manner with the object of portraying the plaintiff as a despotic and arrogant person (to use two defendants' own adjectival characterizations). The jury could further find that such portrayal was false and highly defamatory of the plaintiff.

Moreover, the Court feels that there was ample evidence not only of the defamatory character of the publications, but also that they were indeed published with "actual malice" in the *New York Times* sense. There was, to be sure, some investigation before the story was written, but it was at best desultory and haphazard. No real effort was made to check with eye witnesses other than Mrs. Agin, and no inquiry was made as to her motives although there was evidence from which it could be concluded that she was a bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior. Much more important than this, however, is the fact that the plaintiff was given no bona fide opportunity to tell his version of the story. Defendants argue that two telephone calls were made to him—the first in advance of publication. But it is clear that he was given no intimation of the type of story which the defendants proposed to publish—much less that he was about to be plunged into the glare of front page publicity as the principal villain in a newspaper sob story. Thereafter, although the story was iterated and reiterated in successive publications, the only contact made by defendants with the plaintiff himself was another brief and curt telephone call from Higgins, hardly calculated to encourage the plaintiff to state his version of the facts. The fact that he then expressed a disinclination to do so is quite understandable under the circumstances. The plaintiff then had no reason to suppose that any statement he might make would receive a fair and unbiased presentation from the defendants. Clearly the jury could find that these stories, if not willfully false, were published with reckless disregard of whether they were false or not.

I am of course aware that the United States Supreme Court indicated in *New York Times Co.* v. *Sullivan, supra*, that a newspaper is not required to guarantee the absolute correctness of all its facts. But this is not to say that a newspaper has no duty to check its facts or that it may ignore or even avoid obvious areas where this should be done.

The continuing barrage of repetition of the account of the incident, which followed the initial publication, is further evidence, if that be needed, from which the jury could infer actual malice. It might well be concluded that the defendants were attempting to make a sensational story regardless of the true situation and regardless of the catastrophic effect on the reputation of the plaintiff."

Defendants cite both *New York Times Co.* v. *Sullivan, supra,* and *Pauling* v. *National Review Inc.,* 269 N. Y. S. 2d. 11 (N. Y. Sup. Ct. Special & Trial Term 1966) as authority for their contention that the plaintiffs have not shown "actual malice" as defined in the *New York Times* case. On this point both of the cited cases are factually distinguishable from the present case. In *New York Times* the judgment for plaintiff was reversed not because of its failure of proof but because the Court's charge did not lay before the jury the proper constitutional standard; and while the Court did say that the proofs did not meet that standard, it is noteworthy that the single publication there at issue did not even mention the plaintiff by name. In *Pauling* the plaintiff was a nationally prominent figure and the decision was that of a trial court on motion for dismissal at the close of plaintiff's case, based on the facts of that case, which are wholly different from those here present.

In this case, the jury was charged as to the constitutional standard laid down in *New York Times.* The jury rendered its verdict in the light of that charge and there was evidence to suport that finding.

Finally, it is argued that the damage award was excessive. There was ample evidence from which the jury might con-

clude that the reputation of plaintiff Howard J. Theckston was seriously damaged and that he suffered mental and emotional trauma as a result. I do not consider that either the verdict in favor of Howard J. Theckson or the *per quod* verdict in favor of his wife was excessive.

The motion for a new trial is denied.

ALEXANDER C. WOOD, 3RD /s/
ALEXANDER C. WOOD, 3RD., J. C. C.

SUPERIOR COURT, LAW DIVISION.

Vol. II 542a:22 through 549a:8; 550:19-40; 556a:23-557a:16.

JUDGE'S CHARGE.

In the case now before you, it is undisputed that the plaintiff, Howard Theckston, from March 1, 1961 to the present time, has been and was, during the period of the publication of these articles, the Clerk of the Camden County District Court and as such had and still has a general oversight of all the clerical work of the court, which includes keeping records of all law suits filed in that court, which number in the thousands annually, keeping (412) fiscal accounts, and service of process, that is, summons and complaints, services of summonses and complaints on persons sued in said court and also the serving on litigants and on attorneys of numerous other types of papers having to do with litigation in court. He also has responsibility for levying executions on property of persons against whom judgments have been rendered to the end that such judgments may be collected. I, therefore, charge you that the plaintiff, Howard Theckston, was and is a public official. It is also uncontradicted that the alleged false and defamatory statements which are complained of in this action related to Mr. Howard Theckston's discharge of his official duties. Therefore, I charge you, in addition to what I have already said, that

where a defendant in a libel case is shown only to have circulated the publication for the sole purpose of giving what he believed to have been truthful information concerning the plaintiff in his capacity as a public official, the plaintiff may not recover from the (413) defendant, even though the contents of the article published may have been untrue in fact and derogatory or defamatory of the plaintiff. In order to recover damages for a defamatory falsehood relating to his official conduct, the plaintiff must also prove to you by clear and convincing evidence as I shall discuss that term, that the offending statements were made with actual malice; that is, with knowledge that they were false or with a reckless disregard of whether they were false or not. That, you may recall, is the contention of the plaintiff in this case. In announcing this rule the Supreme Court of the United States expressed what it called a profound national commitment to the principle that debate on issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

Now, I have used the word "reckless" in announcing this rule; that is, that the plaintiff must establish that the offending (414) statements were made with knowledge that they were false or with a reckless disregard whether they were false or not. Recklessness, ladies and gentlemen, is a state of mind and it is a state of mind which can destroy privilege even though the defendant may have made the statement honestly believing it to be true, or, in fact, with an excessive honesty. It has been said if a man through anger or through gross or unreasoning prejudice has allowed his mind to get into such a state as to become upset as to cast reckless aspersions on other people, but for which state of mind which he could not have believed to be true, the jury may properly find that he has abused the occasion and, in that sense, that he has acted maliciously, but let me emphasize that proof merely of negligence on the part of the defendants in publishing material statements which may be untrue, does not constitute actual or express malice. The

defendants' conduct must have gone beyond mere negligence or carelessness. It must have been reckless and without proof of (415) such recklessness on the part of the defendants, the plaintiffs cannot recover. Now, this is not to say that a person or newspaper may use calculated falsehood; that he may knowingly and deliberately publish a lie concerning any person and be free from liability merely because such person is a public official. Such utterances do not and should not enjoy the protection afforded by the Constitution, but mere criticism of public officials and their conduct of public business, the interest in private reputation is overborne by larger public interest in the dissemination of the truth. If upon a lawful publication, for making a publication, the defendants have published the truth and no more, they may not be held liable even though they were actuated by express malice; that is, by actual intent to do do harm to the plaintiffs and, moreover, even when utterances are false the Constitutional principles of freedom of speech and of the press preclude the attaching of adverse consequences to any, except knowing or reckless falsehood, even (416) if spoken out of hatred or malice, utterance honestly believed contribute to free interchange of ideas and ascertainment of truth, but to be knowingly false and false statement made with reckless disregard of the truth, do not enjoy Constitutional protection even when made respecting public officials. Hence, we have the rule which I shall now repeat; that, in order to recover damages for a defamatory falsehood relating to his official conduct, the plaintiff must prove that the offending statements were made with actual malice by which in this concept we mean with knowledge that they were false or with a reckless disregard of whether they were false or not.

If you find that the defendants acted in good faith and with reasonable cause for believing the facts that the articles complained of to be substantially true then your verdict must be for the defendants, even if there were material statements which were, in fact, untrue.

Now, ladies and gentlemen, this brings me to the subject of the burden of (417) proof, which the plaintiffs must carry in this case.

In the usual civil action a burden is on the plaintiff to prove his case by a preponderance of the evidence; that is by the greater weight of evidence. To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as when considered and compared with that opposed to it, has more convincing force and produces in your minds that what is sought to be proved is more likely true than not true.

Now, in this case the law goes one step further and requires that the plaintiff establish actual malice as I have defined that term to you by evidence of convincing clarity. The term convincing clarity or clear and convincing evidence does not lend itself to the preciseness in definition, but it is relative. The measure of proof required thereby falls somewhere between the rule of burden of proof in the ordinary civil (418) case which I have just stated to you and the requirement in criminal cases, where the State must prove its case beyond a reasonable doubt. Clear and convincing proof is proof which will produce in your minds a firm belief or conviction as to the allegation sought to be established.

Now, in considering whether the plaintiffs have proved their case by evidence of convincing clarity or by clear and convincing evidence, please bear in mind that the credible testimony is measured by its weight and not by its quantity. That is, it is never measured merely by the number of witnesses. In determining the weight of the credible testimony and the credence you place in the testimony of the witnesses, you may consider the demeanor of the witnesses on the stand, their manner of testifying, their appearance, their mental capacity, their power of observation, their closeness of attention, the plausibility of their statements, their incon-

sistencies, their contradictions, and the interest that any witness may have in the outcome of the (419) litigation.

It is for you, ladies and gentlemen, to say based on a full and fair consideration of all the evidence in the case whether the plaintiffs have established by convincingly clear preponderance of the believable evidence that the publications here complained of were materially false and were published with knoweldge of their falsity or with reckless disregard of whether they were false or not.

Now, in determining whether the defendant, Triangle, or the defendant, Higgins, acted with good cause and in a reasonable manner in relying upon the information supplied by Mrs. Akin, you must take into consideration all of the facts which may include, but certainly is not limited to, testimony covering the following. The fact that Mrs. Akin did not come to Mr. Higgins as a total stranger, the fact on three different occasions Mrs. Akin repeated her story to Mr. Higgins in exactly or substantially the same way, if you find that to be a fact, the extent to which the (420) story as repeated by Mrs. Akin to Mr. Higgins was corroborated by the outside circumstances which he and his fellow workers on the Inquirer were able by their researchers to gather together, the fact that the memorandum of Theckston to his employees indicated some concern about how he had treated Mrs. Buridrago and concern over the reaction of the employees to it, to that treatment; that is, the fact that Mrs. Akin had been employed in the office of the District Court Clerk for many years and had typed the memorandum in question, the extent to which Mrs. Akin's information was borne out by the records of the Police Department insofar as her story related to matters in which the police would be interested and in which they would be involved; and, the fact that Mr. Theckston, himself, when interviewed by Mr. Higgins admitted an incident of the kind described by Mrs. Akin to Higgins, bearing in mind, however, that I do not recall and, of course, again I defer to your recollection of the facts, ladies and gentlemen, that there is (421) any evi-

dence that any mention was made to Mr. Theckston of any inquiry about the memorandum or the note as such.

Further, in determining whether or not Triangle and Higgins acted in good cause in a reasonable manner in publishing the subsequent articles and this on the issue of their malice, you must take into consideration all the facts again, including, but again by no means limited to such facts as that interview of Mrs. Buridrago by Robert Thomas, a different reporter, and the photographer, Mr. Martin, who also testified in this cause, as I recall it, verified the description of her arrest as reported in the first article. If you find that it did so verify it and that although Mr. Theckston was again interviewed subsequent to the publication of the first article, he at no time sought to correct anything contained in the articles complained of nor did he by any other means seek a correction or retraction, that is a matter for your consideration and it has been dealt with extensively, I believe, by counsel (422) during their argument to you and is a matter which you may consider in your overall consideration of the entire case.

So, in considering, ladies and gentlemen, whether the plaintiffs have carried this burden of proof, you should, of course, consider all of the evidence and the inferences to be drawn from it.

I said of recklessness that it is a state of mind. I repeat as to malice that malice is a state of mind and it cannot be readily established by direct evidence, but its presence or absence may be inferred from what the defendants did. Thus, in considering this matter of actual malice you may consider such circumstances as the use of language and whether it exceeded the demands of the occasion or whether it is in terms beyond and disproportionate to the facts which the defendants have reason to believe.

You may also consider the extent to which, I beg your pardon, you may also consider the extent of the publication and the frequency of appearance of the articles (423) com-

plained of and of other articles which it is undisputed were published dealing with the story and containing repetitions of all or part of the facts contained in the initial publication. As to these, I specifically charge you that they are not complained of as such, as ground for damages, but are to be considered by you in considering the matter. They are in evidence and are to be considered by you on the question of whether, on all of the evidence in the case you should conclude that there was express malice in the publication of the articles and the editorial, which are the subject of the complaint in this case, that is Exhibit P-1 through P-6 inclusive.

Now, there are places in the articles where there is language which is quoted, purports to be quoted from other sources, from an informant and the informant said, et cetera, et cetera. I charge you that it is immaterial that a libel if composed by the defendant is couched in the form of hearsay that a man may slander or libel another as effectively by circulating rumors (424) or reports or by putting his communication, his written communication in this case in the shape of hearsay as by making distinct assertions of the defamatory matter and giving it out as truth within his own knowledge for the accuracy of which he pledges his own veracity. As to the editorial which is Exhibit P-3, if you should find that this editorial consisted of the writer's opinion based on the facts set forth in news articles, then I charge you that the plaintiff is not entitled to recover on the basis of this editorial, unless, you find that there were statements in the article which again were materially or substantially untrue and were published with actual or expressed malice, as I have defined that term to you, and that the comment contained in the editorial did not really relate to the facts, I beg your pardon, that, unless, the facts, comment, contained in the article reasonably related to the facts in the news article, it was not a fair comment.

* * *

Now, ladies and gentlemen of the jury, based upon what I have so far said to you as to the law governing this case, it is up to you to bring in the following possible verdicts.

First, if you find that none of (430) these six publications were materially false, that none of them were published by the defendants with actual malice, that is, with knowledge that the publications were false or with reckless disregard of whether they were false or not, if you fail, in other words, to find that the plaintiffs have satisfied you by evidence of convincing clarity, that all or some of these six publications were published by the defendants with actual malice as I have defined that term to you, then your verdict will be one of no cause of action and that ends your consideration of the case.

If, on the other hand, you find that the plaintiffs have established by clear and convincing evidence that one or more of said publications was materially false and that such publications were published with actual malice, that is with knowledge of their falsity or with reckless disregard of whether they were false or not, then you will proceed to deal with the question of damages.

* * *

Now, ladies and gentlemen, let me just briefly again recapitulate your possible (442) verdicts in this case. I suggest to you that you should examine each of the publications sued upon separately and you should ask yourself with respect to each of them the following questions. First, did the defendant publish untrue statements regarding the plaintiff, Theckston? Secondly, if there were such untrue statements published were they of material signficance in the context of the articles? Thirdly, if there were such untrue statements did these particular untrue statements defame the plaintiff, Theckston, by holding up to hatred, contempt, or ridicule and if there were such untrue statements were they motivated by actual malice as I have defined that term to you?

Now, I have prepared, ladies and gentlemen, a memorandum, which with the consent of counsel, I'm going to hand you. When you finally retire to begin your deliberations, so

you may have a guide to the form of your verdict, if you find that none of these six publications was, as I said, materially false and was published by the (443) defendants with actual malice, that is with knowledge that such publications were false or with reckless disregard of whether they were false or not, then your verdict, as I said will be one of no cause of action and that ends your consideration of the case.

On the other hand, if you find that the plaintiffs have established by clear and convincing evidence that one or more said publications was materially false and that such publications were published with actual malice, that is with knowledge of their falsity or with reckless disregard of whether they were false or not, then you will proceed to the question of damages * * * .

"APPENDIX FOR RESPONDENTS."

(Petitioners here)

pp. 32a:21 thru 44a:3; 45a:9-37

Now, the plaintiff's version as the Court recalls it is that on the afternoon of Monday, September 23, 1963, the plaintiff, Howard Theckston, was routinely engaged in performing his duties as Clerk of the Camden County District Court. The County District Court has broad jurisdiction to handle the litigation of comparatively small civil cases. In a county the size of Camden, the volume of such cases is quite large and the Clerk, whose job it is to keep and maintain all records on each case, from its inception to its conclusion, has a staff of fifteen to twenty persons working under his direct supervision and consisting of subordinate clerks, typists, stenographers, (382) file clerks, et cetera; and also, Sergeants-at-Arms and Constables, whose job it is to serve summonses, notices, orders and papers of the like or nature on people for whom they were intended.

The Clerk's office in Camden occupies a large room, which you will recall, is designated as Room 311 on the third floor of the eighteen story building which serves Camden as both a City Hall and a County Court House. A reception area where the members of the public having business with the office enter, is separated from the working area of the office by a fair-sized counter.

According to the plaintiffs' witnesses, on the afternoon of September 23rd, a woman and a man, who were not immediately identified, but, who, it is now generally agreed were Mr. Molina and Mrs. Buridrago, entered the office. Almost at once, Mrs. Buridrago started to talk in a loud and strident voice. Mr. Theckston and several of the witnesses described it as shouting. Nevertheless, it was apparently made clear (383) that Mr. Molina had a question about a landlord and tenant matter and that Mrs. Buridrago said she was there, as she put it, to "interpret" for him. According to the witnesses for the plaintiff, Mrs. Buridrago refused to quiet down although requested a number of times to do so. Finally, Mr. Theckston says he warned her if she would not be quiet he would call the police, whereupon, she told him to go ahead. Mr. Theckston did telephone the police and Officers Jerome Spratley and Daniel Domeraski responded to the call. When they arrived, according to their testimony, they observed that the woman was talking loudly and gesticulating. Officer Spratley asked Mr. Theckston what he wanted and Mr. Theckston replied he just wanted the woman removed from his office. The Officers then told Mr. Theckston if he wanted her forcibly removed, it would be necessary for him to sign a complaint against her. Mr. Theckston said he would sign such a complaint. The Officers then requested Mrs. Buridrago to leave and she refused. The Officers, (384) according to their testimony, as I recall it, then took Mrs. Buridrago by the arms and attempted to escort her from the office. At this point she sat on the floor, so the policemen dragged her, screaming and crying, out of the Clerk's office and for some distance down a corridor to a police elevator, whose entrance was in the office of the

Clerk of the Camden City Municipal Court, which is located on the same corridor as the District Court Clerk's office. Mrs. Buridrago, according to the Officers, was taken by this elevator directly to the Camden City Police Headquarters, where Acting Sergeant Dominick Palese was on duty as Desk Sergeant. Here, Mrs. Buridrago was booked and according to the testimony, Mr. Theckston signed a complaint against her. She refused at that time to give her name and was committed to the County Jail overnight on a temporary commitment order issued by the Desk Sergeant and from the police station she was again physically dragged to the elevator, transported thereby to the sixth floor of the Court House where (385) both the City and County Jail are located. She was admitted to the women's section of the County Jail. The testimony, as I recall it, being that the City Jail had no accommodations for women. Here she remained overnight and the next morning, Tuesday, September 24, Mrs. Buridrago was taken before the Municipal Court, before Municipal Judge Julius Sklar in Camden City Municipal Court. Here, on the complaint signed by Mr. Theckston she was charged with disorderly conduct and pleaded guilty to the charge, whereupon the Magistrate after hearing a brief statement from Mr. Theckston and, according to my recollection, it is not clear whether that statement was made under oath, imposed a fine of $25 and $5 costs, and in default of payment, committed her to the County Jail for fifteen days. She remained in jail until the following Friday, September 28th, when she was released upon payment of the fine and costs by her son, Herbert Hernandez.

The incident, of course, was witnessed by the employees of the Clerk's office who (386) were present at the time. Mr. Theckston, as I recall it, says there were about thirteen persons then present. The first story in the Inquirer mentioned fifteen. Be that as it may, the incident appears to have triggered some unfavorable comment among the employees. There was discussion of the episode in the District Court Clerk's office and all of it favorable to Mr. Theckston.

Word that there was "sotto voce" criticism apparently reached Mr. Theckston.

Mr. Theckston thereupon prepared and, on or about, Wednesday, the 25th, wrote and caused to be typed by Mrs. Idah Akin, whom he says served him as his confidential secretary, a memorandum addressed to the employees regarding the episode and suggesting that he might arrange for the transfer of "persons who have publicly criticized my actions". The note appears to have gone a step further and suggested if there should be a recurrence, the Clerk would take "immediate action to dispense with the services of the offenders". Copies of this memorandum, signed by Mr. Theckston, (387) were distributed by him to the employees of the office. Mr. Theckston says that his only motive in doing this was to try to get the critics to come forward so he could discuss the matter with them. The defendants, in the news stories and editorial, which are the basis for this suit, referred to it as a "threat". The letter or memo is in evidence and its meaning or construction are for you to judge from a perusal of it, considering it along with all of the other evidence in the case.

• • •

Now, it was against this background of events that the publications alleged by the plaintiff to be libelous appeared.

• • •

The first intimation which the plaintiff had that there would be newspaper publicity came on the evening of Sunday, September 30th. On that evening about seven or 7:30 P.M. he received a telephone call from a man who, according to Mr. Theckston, identified himself as being from the Philadelphia Inquirer. Mr. Theckston says, as I recall it, that the caller did not further identify himself, but it appears to be acknowledged that Mr. Higgins, the co-defendant was the caller. Mr. Higgins, incidentally, said that he did identify himself as Dennis Higgins, but so far as material, this

is a fact which is in issue for you to resolve. The caller, according to Mr. Theckston, asked if Mr. Theckston had a disturbance in his office and Mr. Theckston says he told the caller briefly what happened and pointed out that the incident happened a week before. He says he told the caller the woman had been drinking. After this brief conversation the (389) caller, according to Mr. Theckston, said, "Thank you," and hung up. It is, as I recall it, undisputed that the caller made no reference to the note or to the impending publication of the story.

About midnight or one o'clock A.M., the Theckstons began to receive anonymous telephone calls alluding to "mother of five children that was sent to jail". All of the calls were condemnatory and some were threatening and they persisted at intervals throughout the balance of the night. About 7:30 A.M. on Monday, September 30, Mr. Theckston bought a copy of the Philadelphia Inquirer in Camden on his way to his office and found spread on the front page the story headed "Mother of five jailed in Camden when free speech irks aide". This is in evidence and designated as Exhibit P-1.

This is the first publication of which the plaintiffs complain. It was followed on Tuesday, October 1st, by the article which is Exhibit P-2 headed "Wide protests stirred by jailing of mother (390) who annoyed Clerk". In the same issue of the paper appeared an editorial, which is in evidence as Exhibit P-3 and which is entitled "Court Clerk's despotic arrogance" which is scathingly critical of Mr. Theckston. On Wedesnday, October 2nd, there appeared the article P-4 headed "Bar panel probes five day jail term for mother of three". On Friday, October 4, there appeared still another article, Exhibit P-5, headed "Whitewashing feared in mother's jailing". In that issue of the paper there were published on the editorial page three so-called "letters to the editor" which were given the following black-letter-heads, "Right of free speech"—"Petty Tyranny"—"Crying shame". These appear in a single column and are to-

gether marked P-6. Again, the letters appear to be highly critical of Mr. Theckston.

All of these articles, I have said, are in evidence and it is based on their defamatory character and the adverse consequences ensuing therefrom that Mr. and Mrs. Theckston bring their suit.

(391) There were other articles published dealing with the affair which have been admitted in evidence in this case and which appeared not only during the week between September 30th and October 4, but subsequently during the month of October, up to and including, I believe, as late as October 23rd, but only the articles which I have referred to are offered and are to be considered by you on the issue of damages to be awarded the plaintaiffs, assuming that you reach that point. The others are to be considered by you in connection with the question whether in the publication of the articles sued upon the defendants, the Inquirer and Higgins, were published "with express or actual malice." With this term I propose to deal very shortly.

Now, the plaintiffs assert that these articles contain many statements which are false and which are calculated to injure the plaintiff, Howard Theckston, in his reputation and in his position, and they say that he was indeed so injured.

Let us briefly review some of the (392) respects in which the plaintiffs say the articles were false.

It would appear that the articles which furnish the chief foundation for the plaintiff's complaint in this action are the first three, which are in evidence as Exhibit P-1, P-2 and P-3.

The first of these, the front page articles which appeared in the Inquirer for Monday, September 30th, 1963, would seem to contain most of the facts which continue to be repeated and rehearsed in the subsequent publications.

Let us then examine P-1, the article headlined "Mother of five jailed in Camden when free speech irks aide".

As I recall it, the following are some, not necessarily all, but some of the respects in which Mr. Theckston claims the article to be false.

One. He says that Mrs. Buridrago was not the mother of five children. He produced evidence tending to show that she was the monther of only one child and that this child was a son who had attained full (393) age and was working and assisting in the support of the family. It does appear, however, that Mrs. Buridrago had under her care, at least two minor children, Jacqueline, age thirteen, and Peter, age twelve, the daughter and son of her sister-in-law, Santa Buridrago, both of these children being in their teens. Also, it appears that there was living in the same household one Magdalena, age nineteen and married and with infant children of her own.

Secondly, the plaintiff says it is not true Mrs. Buridrago was denied freedom of speech. He says that he called the police when she became uncontrollably noisy and disorderly in his office.

Thirdly, Mr. Theckston asserts that the statement was that the five children were left without food, protection, or money, as a result of his actions and he says that that statement is false.

Fourth, he says that to style Mrs. Buridrago as an interpreter is false.

Five, he denies that he shouted at Mrs. Buridrago and that he told her to "shut (394) up" or that he said "tell that woman to be quiet" and he specifically denies that he had her jailed as was said in the story. He maintains that she is the one that did the shouting; that the woman was sentenced to jail by Judge Sklar in default of a fine only after she pleaded guilty to a charge of disorderly conduct at a hearing held in the Camden City Municipal Court.

The plaintiff further maintains that the statements that he was angered by criticisms of his part in sending the wo-

man to jail and that he threatened to crush the right of free speech for others who work in his office are false. He denies that he was angered and he states that although he wrote and circulated the document which has been repeatedly referred to as "the note" or "the memo" he did so only in an effort to find out who the dissenting or dissatisfied people were.

Again, the plaintiff denounces as false the statement that the woman, that is, Mrs. Buridrago, protested that she had five children.

(395) He further says that it is false to report that the woman was found guilty. He says that she pleaded guilty and adds that she apologized in the court for her conduct.

Further, with reference to the note, plaintiff claims that the statement that everyone was bitter was false. He says that no one complained to him.

He also says it is false to say that the employees were afraid of him.

He, himself, was misquoted in the telephone conversation which he had with a representative of the Inquirer, presumably Mr. Higgins. He denies that he told the representative or told Higgins that "she was just a drunk" or that she was a "chronic offender in the city" or that "she hits the bottle quite frequently" or "the Judge knew her right away". He does testify, as do a number of witnesses, that Mrs. Buridrago had been drinking, but he denies making any of the other statements. He also denies saying that she was "under the weather" or that "she wouldn't behave so I had her arrested".

(396) Plaintiff further denounces as false the statement implying that the source of much of the information was a "spokesman" for other employees. He denies that anyone spoke or could speak as the representative of any number of City Hall employees.

The second article, as you know, contains much that is repetitious of the Article of September 30th. But it does

contain additional statements which the plaintiff alleges to be false.

He repeats that Mrs. Buridrago was not jailed because she annoyed Clerk, as the headline says, but because of and following her plea of guilty to a disorderly conduct charge.

He says that it is untrue as this article puts it that he "attempted to muzzle" the employees in the office who were critical of him.

He says that the purportedly quoted statement by a "tipster" that "we're scared to death of him" is false.

He says nobody was afraid of him and (397) he says that is not true, as the article says, that he stormed into his office on the morning of September 30th, at 8:30 in the morning, received a telephone call and was gone most of the day. He says that, in fact, he arrived at the office before 8:30 and was occupied the entire day in preparing the monthly report of the Court activities which he is regularly required to send to the administrative director of the courts.

Mr. Theckston also says that it is untrue as the article puts it, that he "rules his office with an iron hand" and that he "never shows compassion to persons who come under his jurisdiction". He points out that no one comes under his jurisdiction, his function merely being administrative and clerical.

In the same issue of the Inquirer as the article designated P-2 in evidence appeared the editorial which bears the designation P-3. The editorial appears to contain nothing which is factually new, and in tone and language it speaks for itself. (398) The plaintiff says that both in its factual references and in its characterization and description of him personally, it is false and defamatory.

The remaining two news articles as to which the plaintiff complains are those which appeared Wednesday, October 2nd, 1963 headed "Bar panel probes five day jail term for mother of three" and the one which appeared Friday, Octo-

ber 4, headed "Whitewashing feared in mother's jailing". These report further developments following on the publishing of the earlier stories in the way of investigations of the Incident by a Committee of the Camden County Bar Association. They report also the offering of a resolution of censure by a number of the Camden County Board of Freeholders which failed of adoption by that body and inquiry by City Councilman Mario Rodriguez, into the conduct of the police in the incident and comments by municipal and county officials.

As I recall it, these articles did not contain and this is a point which has (399) been argued to you, did not contain any reference to an investigation or any findings with respect to this incident made by a Committee of Council 10 of the Civil Service Association. Each of the articles which I have referred to contains a resume of the facts earlier reported, although, it is noted that in the article of October 2nd, Mrs. Buridrago is referred to as the mother of three while in that of October 4, there is simply a statement, the body of the text that "two minor children were left alone while she was imprisoned". Mr. Theckston contends that even this is factually false.

The plaintiffs produced a number of witnesses—District Court Clerk's office employees, such as Mrs. Quattrochi, Mrs. Furigone and others, and attorneys such as Mr. Deighan, Mr. Grazkowski, Mr. Muller and others to show the extent of interest and comment that these stories aroused and their impact on Mr. Theckston's reputation. You also have the testimony of both Mr. Theckston and Mrs. Theckston as to the consquences of the publications of these (400) articles as they felt and observed them.

Now, on their part, the defendants produced a number of witnesses to recount for you their version of the episode in the Clerk's office including Mrs. Buridrago herself, Mr. Molina, the gentleman whom she accompanied to the Clerk's office on September 23, 1963, and Mrs. Akin, a clerk-typist for a number of years in the Clerk's office.

Briefly, as I recall it, the defendant's version is that Mrs. Buridrago accompanied Mr. Molina to City Hall or to the Court House on September 23rd, 1963 when he had instructions to appear in court in connection with a landlord and tenant action against him. It would appear that he was charged with owing more rent than he believed was due. Mr. Molina, you will recall, spoke through an interpreter and from his testimony and that of Mrs. Buridrago it would appear that Mrs. Buridrago accompanied him on the day in question to act as his interpreter, due to his somewhat limited command of English.

(401) On arrival at the Court House they went first to a courtroom where apparently the Court was in session. An attendant, after a brief colloquy, directed them to the Clerk's office on the third floor. They went to the Clerk's office and spoke initially to a woman standing behind the counter. This woman looked at their papers and in turn called Mr. Theckston. Mrs. Buridrago stated that when she attempted to speak for Mr. Molina, Mr. Theckston told her to shut up. She rejoined in kind and he threatened to call the police, whereupon, she replied, "Go ahead. You can't do anything to me." She says Mr. Theckston then went to the telephone and she told Mr. Molina that Mr. Theckston was calling for his records. She says that the police came five or ten minutes later and on Mr. Theckston's instructions grabbed her an took her out. As she recalls it, she was taken to an elevator and transported directly to the jail on the sixth floor where she was taken into the jail by a matron. Here, she remained until the following morning when she (402) was taken before Judge Sklar in the Municipal Court. She was not represented by a lawyer and she says that the complaint was not explained to her. She says the Judge asked her if she was guilty and then she answered, "Yes," and apologized to Mr. Theckston. She was, thereupon, sent to jail for 15 days when she could not pay the $25 fine and $5 costs and she remained in jail until the following Friday, the 27th, when she was released about 7:30 P.M. after her son paid the fine and costs. Mrs. Buri-

drago then told of her interview with an Inquirer reporter and photographer at her apartment on Monday, September 30th.

With respect to the veracity and accuracy of the articles, Mrs. Buridrago said as far as laying within her knowledge, they are true.

As to her children, she explained that she has one son and she is responsible for the care of the two younger children.

According to Mr. Hernandez, the exigencies of his employment prevented him to be home during the day to care for these (403) youngsters while his mother was confined and I recall that Mr. Molina testified that he took them to his house for something to eat, at least, on the evening of the day that Mrs. Buridrago was arrested.

It might perhaps be well to note, as to Mrs. Buridrago's story, that apparently she does not personally recall being taken to the police station and booked on the afternoon of September 23rd. She says she was taken straight to the jail. On the other hand, the two police officers, Mr. Palese, the acting Sergeant, and the police matron, Mrs. Jaskolski, all testified that before being taken to jail she was booked after a fashion in the Police Headquarters in the basement. The weight and credibility to be attached to all this testimony and the inferences to be drawn therefrom are, of course, for you to determine as the sole and exclusive judges of the facts.

Mrs. Akin told you her version of the encounter between Mr. Theckston and Mrs. Buridrago and of the arrest as she observed it.

(404) Mrs. Akin further told of the preparation of the controversial memorandum which figured so prominently in the articles complained of and of the feelings on her part which prompted her to communicate with Mr. Higgins, whose aunt was her friend and whom she knew to be employed by the Inquirer.

• • •

As a part of the consideration of arriving at your conclusion as to whether the reports made by the defendants in this case and published by them were, in fact, substantially true or substantially false or whether they were published in good faith or with knowledge of their falsity or with reckless disregard of whether they were false or not, issues have also been very sharply raised as to the credibility of some of the witnesses and some of the testimony adduced before you, and whether or not that testimony is worthy of belief.

Now, ladies and gentlemen, I charge you that if you believe that any witness in this case knowingly and willfully testified falsely to any material fact in this case, (429) you may give such weight to his or her testimony or other points as you may think it entitled to or you may disregard it altogether. False in one thing, false in all, as we put it. The law expresses it in Latin "falsus in uno, falses in omnibus" is not a mandatory rule of evidence, but it is rather a permissible rule or inference rather that the jury may or may not draw when convinced that an attempt has been made to mislead them in some material respect. Now, that doesn't say that if a witness makes a mistake in detail, this should deprive his evidence of all credibility, but it is rather as I say a permissible inference that the jury may draw, may or may not draw as they see fit, when convinced that an attempt has been made to mislead them in some material respect and that is a matter for your judgment, ladies and gentlemen.

• • •

APPENDIX FOR RESPONDENTS.

(Petitioners here) p. 46a.

MEMORANDUM TO JURY.

1. If you find that none of these 6 publications was materially false and was published by the defendants with actual malice, i. e., with knowledge that such publications were false or with reckless disregard of whether they were false or not, then your verdict will be one of *No Cause of Action.*

2. If you find that the plaintiffs have established by clear and convincing evidence that one or more of said publications was materially false and that such publications were published with actual malice, i e. with knowledge of their falsity or with reckless disregard of whether they were false or not, then you proceed to the question of damages.

Your possible verdicts for compensatory damages in favor of the plaintiffs and against the defendants are as follows: Triangle Pub. Inc. & Dennis M. Higgins.

Compensatory Damages—Against Defendants Jointly

A. In favor of Howard J. Theckston (one lump sum) $60,000.00

B. In favor of Caroline Theckston (one lump sum) $20,000.00

If you conclude that punitive damages are to be awarded against either or both of the defendants they should be assessed against the defendants separately and may be awarded as follows:

Punitive Damages—Against Triangle Publications

In favor of Howard J. Theckston (one lump sum) ..... $.....

Punitive Damages Against Dennis M. Higgins

In favor of Howard J. Theckston (one lump sum) ..... $.....

No punitive damages agaist Triangle Pub. or Dennis M. Higgins.

(Handed to Jury by Court (DII 556a-38-557a-9).)

JUDGMENT OF SUPREME COURT OF NEW JERSEY.

(*Filed July* 8, 1968.)

SUPREME COURT OF NEW JERSEY.

(C-273 September Term 1967.)

HOWARD J. THECKSTON, et al.,
Plaintiffs-Petitioners,

vs.

TRIANGLE PUBLICATIONS, INC., et al.,
Defendants-Respondents.
On Petition
for Certification.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same.

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 8th day of July, 1968.

JOHN H. GILDEA,
Clerk of the Supreme Court.

A true copy.
JOHN H. GILDEA,
Clerk.

MANDATE ON REVERSAL.

(*Filed April* 25, 1968.)

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division, Burlington County is reversed without costs and that the record be remitted to the Superior Court, Law Division, Burlington County to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.

Judgment entered: April 25, 1968.

Mandate issued: May 23, 1968.

/s/ MORTIMER G. NEWMAN, JR.,
MORTIMER G. NEWMAN, JR.,
Clerk of the Superior Court.

(On Petition for Certification to N. J. Supreme Court.)

STATEMENT OF QUESTIONS INVOLVED.

1. Assuming the "whole record" of the trial in libel suit by Clerk of District Court against newspaper, was before the Appellate Division and examined by them, did the Appellate Division err in reversing jury verdict-judgments for plaintiffs because the proofs before the trial court were insufficient to present a jury issue of liability under and as required by the Rule of "actual malice" in *New York Times*?

2. Assuming that only the printed Appendix of the defendants and the printed Appendix of the plaintiffs were before the Appellate Division and only examined by them, did the Appellate Division err in reversing jury verdict-

judgments for plaintiffs because the proofs before the trial court were insufficient to present a jury issue of liability under and as required by the Rule of "actual malice" in *New York Times*?

3. Did the Appellate Division err in not considering and holding that the trial court was in error in holding that plaintiff was a "public official" under the *New York Times* rule, where plaintiff objected to such holding throughout the trial and in Exceptions to Charge?

4. Did the Appellate Division err in reversing the jury verdict-judgments of the Law Division and in remanding the matter for the entering of judgments in favor of the defendants, when they should have affirmed said judgments?

5. Plaintiffs repeat and incorporate herein by reference Counterstatement of Questions Involved in their Brief before the Appellate Division, No. 1 (a) (b) and (c).

COUNTERSTATEMENT OF QUESTIONS INVOLVED.

1

(Brief for Respondents, Petitioners here.)

1. (a) Can a libel judgment for a court clerk against newspaper be reviewed on Question 1: Complete absence of evidence of *New York Times* "actual malice", and Question 5, whether verdicts were excessive, based upon attenuated Defendants' Appendix, reduced to about 1/9th thereof, supporting defendants' points, and omitting substantial portions necessary to be relied on by plaintiffs and essential to consideration of issues and decision of questions on appeal, beyond plaintiffs' financial ability to print; or

(b) in view of greatly attenuated trial record, should appeal not be heard or dismissed regarding these questions; or

(c) should appeals be considered on factual findings of trial judge on his determinations of defendants' motions, charge to the jury of *New York Times Rule* and that there were disputed questions of facts to be decided thereunder; and

jury having brought in unanimous verdicts for plaintiffs, denial of defendants' motion for new trial upon grounds verdicts were contrary to weight of the evidence, excessive and contrary to law, and trial judge holding "that there was ample evidence not only of the defamatory character of the publications, but also that they were indeed published with 'actual malice' in the *New York Times* sense".

2. Otherwise, plaintiffs meet herein defendants' questions stated.

(Brief of Appellants, Respondents here.)

1

STATEMENT OF QUESTIONS INVOLVED.

1. Where the plaintiff is admittedly a public official, can a libel judgment in his favor be sustained when there is a complete absence of evidence and that the articles complained of were published with actual knowledge of any falsehood or reckless disregard of the truth?

2. Was it not error for the court below to admit in evidence publications in defendant's newspaper which were not sued on and to instruct the jury that the fact of repeated publication could be considered evidence of malice?

3. Was the plaintiff's wife entitled to any recovery for loss of consortium?

4. Did the court below correctly charge the jury concerning the damages which plaintiff's wife could recover, assuming she was entitled to recover for loss of consortium?

5. Were the verdicts excessive?

Appendix C.

EXHIBIT P-21A.

Camden, N. J., Sept. 23, 1963.

Name—Buridrago, Marguerit; Race—P. R.

Address—310 Washington St.; Sex—Female.

City and State—Camden, N. J. Age 41.

Location of Arrest—Room 311, City Hall.

Condition—Drunk.

Arrested by—D. Domeraski; J. Spratley.

On Complaint of—Howard Theckston.

Cell No.—C. J.

Jailer—A. Monroe.

Address—Room 311, City Hall.

Charge—Disorderly Conduct.

Received by—Dominic Palese.

Time—3:10 P. M.

Disposition and Date—9-24-63.

15 days or $25.00 plus $5.00 costs.

EXHIBIT P-1

Philadelphia Inquirer

PUBLIC LEDGER

AN INDEPENDENT NEWSPAPER FOR ALL THE PEOPLE

MONDAY MORNING, SEPTEMBER 30, 1963

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P-1

THIS EXHIBIT
TO THE CO
OFFICE OF THE

Mother of 5 Jailed in Camden When 'Free Speech' Irks Aide

By [illegible]

Margurit Buridrogo, a relative newcomer to Delaware Valley, loves the United States. She's proud of her American citizenship and her knowledge of English. In fact, Mrs. Buridrogo, 41 appoi ed herself interpreter for her Spanish-speaking friends in Camden. When they had o deal in English, she made it a point to be with them to help in translating.

She's not too familiar with the Constitution, but she knows that somewhere in it a law gives her the right to freedom of speech, in a free country.

The First Amendment and its guarantees were shattered for her last week as she plied her

Note to court office employes on Page 30.

role of volunteer interpreter on the third floor of Camden's City Hall.

As a reward for her troubles, Mrs. Buridrogo spent five days in jail on disorderly conduct charges pressed by a minor official with whom she quarreled. Her five children were left at home with no one to feed or care for them.

Mrs. Buridrogo's plight became known only Sunday when the same minor official, angered because of criticism for his part in sending the woman to jail, threatened to crush the right of free speech for others who work in his office.

LEFT WITHOUT FOOD

These particular free Americans wouldn't stand for it. They told the Inquirer of the injustice.

The oldest of Mrs. Buridrogo's youngsters is in his teens. The children live with her on the second floor of a row house at 316 Washington st., Camden, in a section where the music of the Spanish language and the aroma of Puerto Rican cooking fill the air.

For the better part of a week, the youngsters were without food, protection, or money.

Mrs. Buridrogo's story began last Monday afternoon, when she accompanied a friend to the Camden county District Court office in Room 311 of City Hall. She wasn't involved in the case; she wanted to make sure a friend who also came from Puerto Rico received a fair shake.

A woman office worker listened to Mrs. Buridrogo tell her friend's story. The woman used "understandable" English—and, partly because she was proud of facility with the tongue, she spoke in a loud, distinct voice.

Howard J. Theckston, clerk of the court, looked up from his work.

"Tell that woman to be quiet," a witness quoted him as saying.

POLICE SUMMONED

To Mrs. Buridrogo this was some sort of misunderstanding. She continued talking to the office woman.

"YOU SHUT UP!" shouted Theckston. "I'LL HAVE YOU ARRESTED!"

"Go ahead," retorted Mrs. Buridrogo in dismissing the man's threat as an annoyance.

The court clerk picked up the telephone and called the police.

Noticing Theckston on the

Continued on Page 30, Column 1

Mother Jailed, Irked Official

By DENNIS HIGGINS

Continued from First Page

phone. Mrs. Buridrogo turned to her companion and said:

"Ah! He's calling for your records."

The 15 witnesses to the exchange watched in amazement as two Camden patrolmen entered the office and took Mrs. Buridrogo, hysterical and screaming when she realized what was happening, off to jail.

"I have five children," the woman pleaded. "What will happen to them?"

TAKEN TO JAIL

On a complaint filed by Theckston, she was booked for disorderly conduct and held overnight in the building's sixth-floor jail.

The office staff was shocked. There was no doubt the woman was perhaps guilty of arguing with a person in authority. But jail?

The next morning Mrs. Buridrogo appeared before Municipal Judge Julius Sklar. She was found guilty as charged, and sentenced to a $25 fine and $5 court costs or 15 days in jail. Weeping, she was imprisoned once more when she said she had no money.

FIRINGS THREATENED

The news spread throughout City Hall by the "grapevine." Behind doors, and in hushed tones, Theckston was criticized severely.

Word of the grumbling somehow got back to the court clerk. On Thursday, a neatly typed note appeared on each desk in Room 311. It began by chastizing the "disloyal" office employes, and continued:

"If those persons, who have publicly criticized my actions (in the Buridrogo affair) wish to transfer or leave this office, I shall be glad to accommodate them for I can arrange for their termination quite easily.

15 NOTES SENT

"I will brook no interference with my administration of the affairs of this office, and if there should be a recurrence, I shall take immediate action to dispense with the services of the persons responsible."

It was signed over a line reading Howard J. Theckston, Clerk.

One of the 15 notes was delivered to The Inquirer by an office worker who begged not to be identified.

"Everyone was bitter from the beginning," the informant said. "Then, to top it off, we got the letter."

It was pointed out that the contents of the correspondence might be of great interest to Mrs. Thelma Parkinson Sharp, of Vineland, president of the State Civil Service Commission.

It is not considered cricket in Civil Service circles to threaten employes in such a manner, no matter what the circumstance. But Mrs. Sharp is likely to hear of the incident only if she reads The Inquirer.

"We won't complain," a reporter was told. "Everyone's afraid of him (Theckston)."

On Thursday, shortly after the notes were distributed, one of the Buridrogo youngsters telephoned City Hall.

RANSOM OFFERED

"I have $25 from the rent money," he was quoted as saying. "If I give it to you, can I have my mother back?"

The boy was told that the extra $5 in court costs must also be paid.

"Oh!" he said.

Somewhere, somehow, the fine and costs were gathered and delivered to the authorities. Mrs. Buridrogo was reunited with her children on Friday.

Contacted Sunday at his home at 429 Hunter st., Gloucester, Theckston dismissed the affair by saying the woman was just a "drunk."

"She came in with another party—who had no connection with her—and was apparently uninvited. Evidently she's a chronic offender in the city. The judge knew her right away.

"She hits the bottle quite frequently," Theckston explained. "She was under the weather in my office. She wouldn't behave herself, so I had her arrested."

The person who came to The Inquirer, as spokesman for a number of City Hall employes, insisted the woman wasn't intoxicated.

"She was just excited. She was proud of her English and became loud when she was ordered to be silent."

Philadelphia Inquirer
PUBLIC LEDGER
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EXHIBIT P-2

TUESDAY MORNING, OCTOBER 1, 1963
Copyright, 1963, by Triangle Publications, Inc., Vol. 255, No. 91
WFIL 560 KC • WF

Wide Protests Stirred By Jailing of Mother Who Annoyed Clerk

Officials Duck Out On Storm

The Delaware Valley reacted with widespread shock and indignation Monday against the jailing of a Camden mother because she dared to raise her voice in the office of a minor court official.

Persons from all walks of life demanded that "something be done and done quickly" about the case involving Mrs. Margarita Bultrago, the mother of three.

FIVE DAYS IN JAIL

A Puerto Rican, Mrs. Bultrago spent five days in prison after work after being unable to post a $25 fine on a disorderly conduct charge.

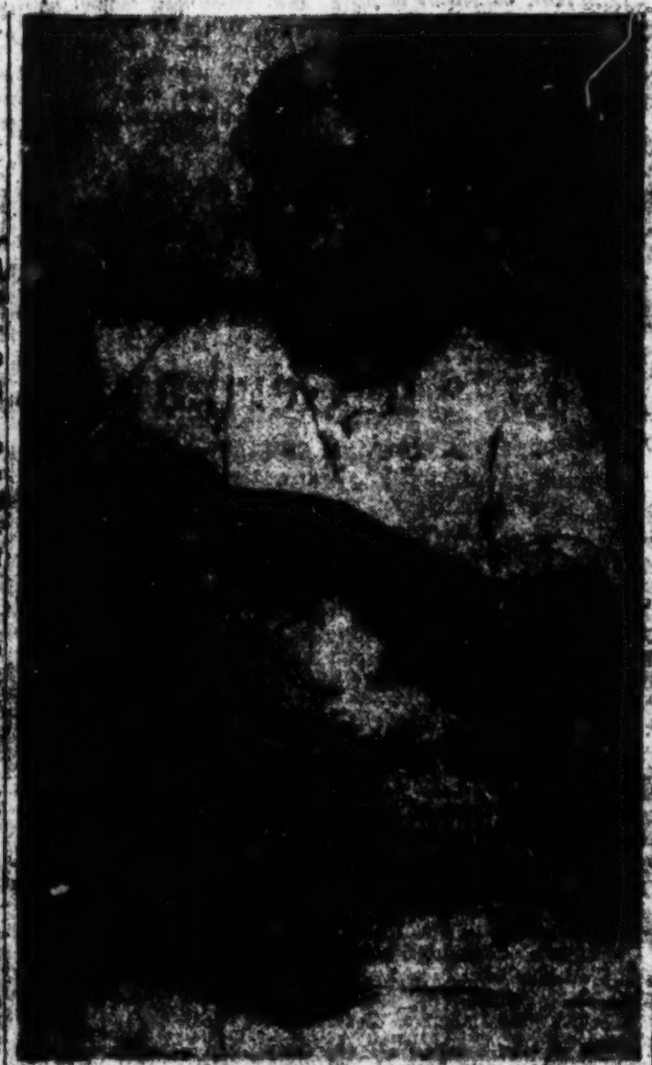
The Inquirer disclosed the incident Monday morning after

Mrs. Bultrago Tells Her Story—Page 4

District Court Clerk Howard J. Theckston, who pressed the charge against Mrs. Bultrago, attempted to "muzzle" employes who work in his office and who were critical of his action in the case.

Theckston delivered a note to each employe in the office last Thursday morning. It called those who criticized him "disloyal." It said in part:

"I am sure that any such



Mrs. Margarita Bultrago pauses in her rocking chores at her Camden home to display bruises she says was inflicted when arrested last Monday.

OFFERS TERMINATIONS

"If those persons, who have publicly criticized my actions, wish to transfer or leave this office, I shall be glad to accommodate them for I can arrange their terminations quite easily.

"I will brook no interference with my administration of the affairs of this office, and if there should be a recurrence, I shall take immediate action to dispense with the services of the persons responsible."

It was signed over a line reading Howard J. Theckston, Clerk.

One of the "disloyal" employes, acting as spokesman for the rest, brought the story—and the threatening note—to The Inquirer's attention.

Theckston, a Democrat from Gloucester and a former Freeholder, stormed into his office in Camden at 8:30 Monday, [illegible] as a sidelight [illegible] other office workers.

Shortly afterward he received a telephone call, then left the [illegible]

Continued on Page 4, Column 2

Woman's Arrest Stirs Wide Protests

Continued from First Page

fice and was gone most of the day, another county employe said.

"We're scared to death of him," the tipster said.

While the clerk was absent, many indignant persons called in to protest Theckston's actions last Monday afternoon when he had Mrs. Buitrago jailed.

One who called said it was "a disgrace that taxpayers have to pay the salaries of such men."

Theckston reportedly rules his office with an iron hand and "never shows compassion" to the persons—all of whom are in some kind of trouble—when they come under his jurisdiction.

"He's very cold," an office worker said.

CLERK'S STAFF

Theckston supervises two constables, three sergeants-at-arms and a number of secretaries and clerks whose job it is to process and serve all District Court papers.

The office handles cases before and after a judgment, enforces evictions of rent-delinquent tenants, prepares trial lists and dates and jury cases and a multitude of court-connected chores.

Theckston has been overseer at the office for two and a half years. He previously supervised the office, but transferred to the department of county institutions.

Mrs. Buitrago came before Theckston not as a person in trouble. She accompanied a Puerto Rican friend to the District Court office to help translate for the man.

HAULED OFF BY POLICE

When she spoke loudly, Theckston had her arrested as disorderly. Two policemen were summoned to take the 41-year-old woman, who misunderstood Theckston's intentions, to jail. She is five feet, one inch tall.

Mrs. Buitrago on Monday showed reporters bruises on her arms and ascribed them to manhandling by the police.

"She tried to get away," said Patrolman Jerome Spratley, one of the arresting officers.

Meanwhile—and despite the public clamor — a curious silence prevailed in many quarters in and around Camden and throughout the county.

COUNTY OFFICIALS MUM

Many Camden county officials whose jurisdiction embraces the function of the court clerk were either "not at their desks" on Monday or "unavailable" for comment. Others who were contacted declined to say anything.

Even Camden's Mayor Alfred Pierce took an unusual view of the sentencing. He said the matter was out of his jurisdiction since the court was a county function and not a city one.

"There were no city officials involved in any way," the Mayor said. "It is even improper for me, as an attorney, to criticize the conduct of the courts."

Municipal Judge Julius Sklar sentenced Mrs. Buitrago to 15 days in jail after she was unable to pay a $25 fine and $5 costs. She was released on Friday when the money was raised.

Judge Sklar was appointed to a three-year term by City Council.

COUNCILMAN AROUSED

One Councilman, Mario Rodriguez, whose parents were born in Puerto Rico, did come forth and announce that he was starting an investigation.

"I feel very strongly about this matter," Rodriguez said. "If there has been discrimination, I'll demand that something be done.

"There's no reason why a person with a heavy, loud voice should be persecuted."

PROCEDURE CRITICIZED

Rodriguez said he was in the company of an attorney for a short period of time on Monday and that the lawyer apparently was aware of the incident.

The lawyer was quoted as telling Rodriguez that the situation "was not handled correctly."

ACLU INVESTIGATES

The American Civil Liberties Union conducted what it called "a slight investigation" into the affair Monday and later reported that Theckston's claim that the woman was drunk seemed to stand up.

However, Charles Crabbe Thomas, ACLU vice president in Camden, admitted that he had been associated closely with Theckston for some time and harbored some prejudice in the case.

Thomas said he telephoned Theckston to ask whether he was right or wrong. Theckston, said Thomas, repeated his charge of drunken conduct against Mrs. Buitrago, and said he was correct in sending her to jail.

NOT POLICE CHARGE

(The Camden Police Department specifically charged Mrs. Buitrago with disorderly conduct. She was not charged with drunkenness.)

Thomas declined to comment on Theckston's bitter note to his office colleagues, saying he was "not yet prepared" to discuss it.

Recognizing his prejudice, Thomas said he would call a meeting of the ACLU's South Jersey Council to consider any further action.

Severe criticism of Theckston came via the City Hall "grapevine" — in hushed tones and behind closed doors. Somehow, Theckston learned of this and composed the sharp note to the 15 persons who work under him in the District Court office.

'HEARD NOTHING'

Mrs. Thelma Parkinson Sharp, president of the New Jersey Civil Service Commission, said she knew of the incident only by reading The Inquirer.

"We've heard nothing from anyone down there," she said.

Theckston's employes would have to file a formal grievance with her department before it could enter the case, Mrs. Sharp said.

"I don't know the man (Theckston), and I don't know if anything has preceded this—whether he's had difficulty with his employes before, whether this is the climax or the first instance."

Mrs. Sharp noted, however, that Theckston could not carry out his threat to "terminate" the jobs of his workers "without filing charges against them with us."

A spokesman for the Civil Service Association of Camden said that action would be taken against Theckston only if formal charges are filed.

EXHIBIT P-3

The Philadelphia Inquirer

h TUESDAY MORNING, OCTOBER 1, 1963 28

Editorials

Court Clerk's Despotic Arrogance

When a petty bureaucrat assumes the role of a tyrant—and sets himself up as a little Caesar, an autocratic lord and master who maintains dictatorial rule over his domain by inflicting fear and intimidation upon his subjects—the hallowed American principles of liberty and justice are reduced to a mockery and a sham.

Howard J. Theckston, Camden County District Court Clerk, has conducted himself in a manner that is intolerable and outrageous not only to the people directly involved but to the public-at-large. The freedom of everyone is in jeopardy if the bullying and threatening of any public official, even in a minor capacity, is allowed to prevail.

A court clerk who, according to reports, shouts at a mother of three children to "shut up"—a woman who comes from Puerto Rico and must speak loudly to make her English understood—and then has her arrested for disorderly conduct and jailed because she couldn't pay the fine, is exceeding all bounds of reason and duty as a public servant.

Theckston compounded the outrage by sending an imperious memorandum to the employes in his office stating, in part: "If those persons, who have publicly criticized my actions, wish to transfer or leave this office, I shall be glad to accommodate them for I can arrange for their termination quite easily. I will brook no interference with my administration of the affairs of this office, and if there should be a recurrence, I shall take immediate action to dispense with the services of the persons responsible."

This is just about the worst instance of over-inflated self-importance and windbaggery that has come to our attention in some time. Does the clerk really think he can impose a gag on public employes and get away with it?

Responsible officials of Camden county, including members of the judiciary, should conduct a thorough investigation of Clerk Theckston and take whatever action may be appropriate to free the employes of his office and the general public from further indignities.

EXHIBIT P-4

Philadelphia Inquirer
PUBLIC LEDGER
AN INDEPENDENT NEWSPAPER FOR ALL THE PEOPLE
WEDNESDAY MORNING, OCTOBER 2, 1963 J

Bar Panel Probes 5-Day Jail Term For Mother of 3

By DENNIS M. HIGGINS

The Camden County Bar Association on Tuesday opened a private investigation into evidence against a minor court clerk who jailed a Puerto Rican interpreter who dared to raise her voice in his presence.

Public indignation and shock continued in the Delaware Valley as hundreds of outraged persons from all walks of life demanded that action be taken against Howard J. Theckston, clerk of the Camden District Court.

In marked contrast, the Camden County Board of Freeholders listened to a resolution introduced Tuesday which criticized Theckston and then declined to adopt it.

SHOCKS ATTORNEYS

Other county and city officials continued their "no comment" attitude which has prevailed since The Inquirer disclosed the imprisonment of Mrs. Margarita Beitrago, 41, of 310 Washington st., Camden, the mother of three, a week ago Monday.

The president of the bar association, Nail Deighan, Jr., said "many of the practicing attorneys were astounded and shocked" at the disclosure of Theckston's actions.

"My personal reaction to the reported stories and editorial (in The Inquirer) is that this incident is either a gross infringement on civil rights or one of the worst and most distorted newspaper reports I have seen," Deighan wrote in a memorandum furnished to the four-man committee.

SERVES FIVE DAYS

Mrs. Beitrago served five days of a 15-day sentence in jail when she was unable to pay the $25 fine and $5 costs imposed by Municipal Judge Julius Sklar.

Her plight became known when Theckston attempted to gag criticism of his part in sending the woman to jail by writing notes to his office workers threatening to "terminate" their Civil Service jobs.

The motion condemning Theckston's actions which was introduced Tuesday by Republican Freeholder N. Leonard Smith failed to receive seconding support from any other member of the Board of Freeholders. It, therefore, was not put to a vote.

Smith told The Inquirer he was warned in a caucus session not to introduce the resolution. He introduced it anyway, he said, "in the cause of justice."

CONTINUES PROBE

City Councilman Mario Rodriguez continued his investigation into another facet of the case—a charge of police brutality made by Mrs. Beitrago. The woman showed reporters ugly bruises on both arms she claimed were inflicted by two policemen who dragged her from Theckston's office.

Rodriguez said he feels the entire affair could have been handled in a "much better manner." He said he will report his findings to Camden Mayor Alfred Vino.

Freeholder Director John A. [illegible] Theckston as a "cog" operation who should have known that people who enter his office are likely to be "upset."

Philadelphia Inquirer

PUBLIC LEDGER

AN INDEPENDENT NEWSPAPER FOR ALL THE PEOPLE

FRIDAY MORNING, OCTOBER 4, 1963

J

EXHIBIT P-6

(From Editorial Page)

Whitewashing Is Feared in Mother's Jailing

By DENNIS M. HIGGINS

A Camden county Freeholder warned Thursday that political pressure may result in a "whitewashing" of the County Bar Association's investigation into Howard J. Theckston's District Court office and the arrest of a Puerto Rican woman interpreter last week.

N. Leonard Smith, whose resolution condemning Theckston was ignored Tuesday at a meeting of the Board of Freeholders after he had been previously warned not to introduce it, further charged that the 41-year-old Camden mother's nationality may have had a bearing on the case.

JAILED FOR 5 DAYS

"I don't know all the particulars of the case and I'm not trying to judge the principals involved," Smith said, "but it doesn't seem to be a fitting punishment for the crime which she was charged."

Mrs. Buitrago, of 310 Washington st., served five days of a 15-day jail sentence for disorderly conduct on charges pressed by Theckston. Two minor children were left alone while she was imprisoned.

THREATENS FIRING

"If an average person would have had a similar complaint lodged against him, would they have received a similar sentence?" asked Smith.

[illegible] reacted unfavorably to the $6000-a-year clerk's actions in having Mrs. Buitrago jailed, Theckston wrote a memorandum promising to take "immediate action to dispense with the services of the persons responsible" for the proceedings.

RIGHT OF FREE SPEECH

To the Editor of The Inquirer:

Thank you for your story o. the Camden woman arrested for speaking loudly in a public building. It points up the fact that not ALL problems of civil rights involve integration.

At our country's birth, far-seeing men realized the value of newspapers in exposing such arbitrary trampling of individual rights by public officials, petty and otherwise, and proposed special safeguards to prevent muzzling of the press, parallel with the right of the general public to enjoy free speech. I am happy that The Inquirer is thus continuing to carry out its civic responsibilities, based on such historical precedent.

SERVETUS

Langhorne, Pa.

PETTY TYRANNY

To the Editor of The Inquirer:

The performance of Howard J. Theckston, the Camden Clerk of the Court who jailed a woman five days because she annoyed him, and threatened his staff if they criticized his action further, is outrageous. If justice is to be done, Mrs. Sharp of the State Civil Service Commission in Vineland should take disciplinary action against Theckston, if possible requiring that he refund to the woman, the money she had to pay to go free.

This petty tyrant deserves fitting punishment for his arrogance. Congratulations to your paper for exposing him.

MRS. ALICE JOHNSON

Trevose, Pa.

* * * * * * * * * *

* * * * * * * * * *

CRYING SHAME

To the Editor of The Inquirer:

In reference to the case of Mrs. Buitrago, it is a crying shame that this should have ever happened.

As for Howard J. Theckston, I would be arrested for my thoughts of him.

ROBERT F. SMITH

Philadelphia.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 608.

HOWARD J. THECKSTON and
CAROLINE THECKSTON,

Petitioners,

v.

TRIANGLE PUBLICATIONS, INC., a Corporation of Delaware, and DENNIS M. HIGGINS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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I.

COUNTERSTATEMENT OF QUESTION PRESENTED.

The Clerk of the Camden County District Court and his wife brought an action in a New Jersey state trial court against the Philadelphia Inquirer and its reporter for libel and loss of consortium. A jury verdict awarding $60,000 to the Clerk and $20,000 to his wife was reversed by a state appellate court, which ruled, on the authority of *New York Times Co. v. Sullivan,* 376 U. S. 254, and related cases, that the publications were constitutionally protected since the proofs submitted were insufficient to make out a jury question as to whether they had been published with actual malice. Therefore the question presented is:

Should this Court grant a writ of certiorari to review a judgment where the only federal question involved has previously been adjudicated in recent decisions of this Court, and the state appellate court correctly followed and applied such decisions in reversing the state trial court?

II.

COUNTERSTATEMENT OF THE CASE.

No novel or unresolved federal question is presented by the present Petition. Here, the Appellate Division of the Superior Court of New Jersey, following the express mandate of this Court in *New York Times Co. v. Sullivan*, 376 U. S. 254, has independently reviewed the trial record and concluded that a libel judgment against Respondents cannot stand under the First and Fourteenth Amendments, thereby vindicating important constitutional rights. Indeed, the complete lack of substance in the present Petition is graphically demonstrated by its rambling and conclusory nature, and by its total failure to set out the facts material to the questions raised. On these grounds alone, the writ should be denied. Rules 23(1)(e) and 23(4) of the Supreme Court of the United States.

The basic federal question in this state libel action, which was filed by Howard Theckston, the Clerk of the Camden County, New Jersey, District Court, and his wife, is whether certain publications concerning a public official were made with that high degree of malice necessary to deprive them of constitutional protection. At issue were four news articles (Petition for Certiorari, Exhibits P-1, P-2, P-4 and P-5), an editorial (Petition, P-3) and three letters to the editor (Petition, P-6), all of which appeared in Respondent's newspaper, the Philadelphia Inquirer, during the week of September 30, 1963. These publications were concerned with two incidents which admittedly occurred in the prior week in the office of the Camden County District Court Clerk. On September 23, 1963, Mrs. Margarita Buitrago, a Puerto Rican woman who had come to that office with a friend to interpret for him, was arrested, dragged out of the office, and jailed on instructions from Theckston. The second incident occurred two days later

when Petitioner, reacting to criticism of his conduct in the first incident, circulated the following memorandum to his office employees:

> "DISTRICT COURT PERSONNEL:
>
> "It has been brought to my attention by persons who come into this office, to do business in this Court, that there are some disloyal employees in this Office who are quick to comment to them about my actions the other day with regard to the arrest of a disorderly person.
>
> "I am sure that any office would be better off without such persons, especially an office of the courts.
>
> "If those persons, who have publicly criticized my actions, wish to transfer or leave this office, I shall be glad to accommodate them for I can arrange for their termination quite easily.
>
> "I will brook no interference with my administration of the affairs of this office, and if there should be a recurrence, I shall take immediate action to dispense with the services of the person responsible.
>
> HOWARD J. THECKSTON"

Theckston contended that the articles and editorials written by the Inquirer and its reporter, Respondent Higgins, concerning his conduct in these incidents libeled him, and were published with actual malice. After a trial before a jury, he was awarded $60,000 in damages, while his wife was awarded $20,000 for loss of consortium. A motion for a new trial and for judgment notwithstanding the verdict thereafter was denied by the trial judge. Respondents then appealed to the Superior Court of New Jersey, Appellate Division, which reversed on the authority of *New York Times Co. v. Sullivan*, 376 U. S. 254, and related cases, and

ruled that Petitioner's proofs had been insufficient to make out a jury question on malice. Petitioners then sought review of the judgment of the Appellate Division by filing a petition for certification with the Supreme Court of New Jersey. That court denied the petition, and the present Petition for a Writ of Certiorari followed. The relevant facts relating to the question of malice are set forth below.

Respondents first learned of the two incidents in Theckston's office on September 25, 1963, when Mrs. Idah Agin, a twelve-year employee of the office (D-a, 366a),[1] called on Higgins and informed him that Mrs. Buitrago, a Puerto Rican woman, had come to Theckston's office two days before and had been interpreting for a friend. Although instructed to be quiet by Theckston, she had refused to lower her voice, and Theckston thereupon called the police and requested that "a disorderly person" be put out of his office (D-a, 392a). Higgins was further told that Mrs. Buitrago stood quietly for five or six minutes until the police arrived, having believed that Theckston had called for the record of her friend's case (D-a, 392-93a). When two policemen arrived, each took Mrs. Buitrago by an arm, and she was dragged from the office (D-a, 393a). Mrs. Agin informed Higgins that she and the other employees had been upset by what they believed to be the injustice of Theckston's action, and then narrated to him all of the facts which appeared in the first publication (D-a, 392a, 394a; Petition, P-1), including the publication of the memorandum and the contentions that Mrs. Buitrago was merely "excited", not drunk, and had referred to her "five children" when arrested (D-a, 398a, 393a).

1. For the convenience of the Court, the same abbreviations used in the Petition are adopted herein. Thus, "D-a" preceeding specific page references refers to the two-volume "Appendix for Appellants" (Respondents here) in the Superior Court of New Jersey, Appellate Division, and "P-b" refers to Petitioners' Brief in that court.

To verify the facts as narrated by Mrs. Agin, Higgins and other reporters for the Inquirer conducted an investigation into the incidents in Theckston's office. As a result, it was verified prior to the first publication that Mrs. Agin had worked in Theckston's office for eight or nine years (actually twelve) (D-a, 347a, 366a), was Theckston's secretary (D-a, 129a), and had actually typed the memorandum in question (D-a, 304a). Higgins was instructed to and did obtain a copy of the Theckston Memorandum (D-a, 218a, 223a, 227a). After the initial contact, moreover, Higgins again verified the facts as recited to him with Mrs. Agin, and they corresponded "exactly" with her earlier narrative (D-a, 221a). During the week of publication, a total of seven additional contacts was made by Higgins with Mrs. Agin to verify specific facts (D-a, 409a). No evidence was adduced at trial that demonstrated any actual doubt, or suspicion of falsity, on Respondents' part to Mrs. Agin's story.

In addition to the investigation into Mrs. Agin's background and reliability, Respondents also verified the published facts independently with others. Prior to publication, Higgins posed questions to and discussed the case with the Inquirer's Camden reporters on four different occasions (D-a, 219a, 223a, 227a, 306a). Further, Higgins himself visited Mrs. Buitrago's home twice and, not being able to locate her on those occasions, conferred with certain of her neighbors, who told him, *inter alia*, that she had a "slew of kids." (D-a, 225a, 226a). The Camden reporters were specifically told by Higgins to check out the police and court records on Mrs. Buitrago's arrest, and as a result of such check, Higgins was informed that Mrs. Buitrago had been found guilty of disorderly conduct on a charge signed by Theckston, and had actually spent five days in jail on a fifteen day sentence after she was unable to pay the twenty-five dollar fine and costs (D-a, 219a, 220a).

Following the initial publication (Petition, P-1), Higgins spoke again with Thomas, one of the Camden reporters, who had succeeded in contacting Mrs. Buitrago, and had interviewed her for more than one and one-half hours (D-a, 246a, 247a, 248a, 483a). Thomas was informed by Mrs. Buitrago that she had three children, not five, as originally reported, and this was promptly changed in the second story (D-a, 484a; Petition, P-2 (first paragraph)). Thomas' visit revealed a neat and clean apartment (D-a, 444a, 484a, 486a), and there was no indication of intoxicants on the premises (D-a, 485-86a). Higgins and Thomas also interviewed one of the arresting police officers (D-a, 247a), an official of the American Civil Liberties Union (D-a, 249a), and an official and the counsel for the state and city Civil Service Commission (D-a, 250a).

On the day before the first publication, Higgins, who had been informed by the Assistant Managing Editor that no story would be printed before Theckston was contacted (D-a, 452a), called Theckston, who attempted to dismiss the incident, but confirmed that he had brought about Mrs. Buitrago's arrest (D-a, 133a). Thomas also tried to contact Theckston during his investigation into the facts, but was unsuccessful in contacting either him or the sentencing judge (D-a, 492a). Each of Respondents' challenged publications (Petitions, P-1 through 5), was based upon and followed the results of the investigation set forth above, and no evidence was adduced by Petitioners to demonstrate that Respondents published any of the articles with a high awareness, or indeed any awareness, of probable falsity.

III.

REASONS FOR DENYING THE WRIT.

The Judgment of the State Appellate Court on the Merits of the Federal Claim Herein Fully Accords With the Applicable Decisions of This Court, and Presents No Federal Question of Substance Not Previously Determined in Those Decisions.

In a series of decisions beginning in 1964 with *New York Times Co. v. Sullivan*, 376 U. S. 254, this Court has ruled that the First and Fourteenth Amendments bar a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he can show with convincing clarity that the publication "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. at 279-80.[2] In its opinions delivered in this series of cases, the Court has set forth the criteria for determining who is a "public official"[3] and has explained in detail the nature of the showing which must be made to establish the requisite "malice."[4] The judgment of the state court herein does not present any federal question of substance

2. Accord, *Garrison v. Louisiana*, 379 U. S. 64; *Henry v. Collins*, 380 U. S. 356; *Rosenblatt v. Baer*, 383 U. S. 75; *Curtis Publishing Co. v. Butts*, 388 U. S. 130; *Beckley Newspapers Corp. v. Hanks*, 389 U. S. 81; *St. Amant v. Thompson*, 390 U. S. 727. See also *Time, Inc. v. Hill*, 385 U. S. 374; *Linn v. United Plant Guard Workers*, 383 U. S. 53.

3. *New York Times v. Sullivan, supra* at 283, n. 23; *Garrison v. Louisiana, supra* at 76-77; *Rosenblatt v. Baer, supra* at 84-86; *Curtis Publishing Co. v. Butts, supra; St. Amant v. Thompson, supra* at 730, n. 2.

4. *New York Times v. Sullivan, supra; Garrison v. Louisiana, supra; Henry v. Collins, supra; Curtis Publishing Co. v. Butts, supra; Beckley Newspapers Corp. v. Hanks, supra; St. Amant v. Thompson, supra.*

not previously determined in those opinions. In remanding the case for entry of a judgment in favor of Respondents, moreover, the Appellate Division correctly applied the applicable constitutional criteria established by this Court. Under these circumstances, review on a writ of certiorari certainly is not warranted here under Rule 19 of this Court.

A careful reading of the present Petition suggests that Petitioners are attacking the judgment of the Appellate Division essentially on three points—(1) failure to properly apply the actual malice test; (2) failure to review "the entire record" in reversing the trial court; and (3) erroneous characterization of the Petitioner Howard Theckston as a "public official." The lack of merit in each of these points in turn will be discussed below.

1. The Appellate Division Correctly Applied the Actual Malice Rule.

In reversing the trial court's judgment in favor of Petitioners on the ground that no jury issue of liability had been made out, the Appellate Division followed the consistent rule of this Court that an appellate tribunal must review the trial court record independently in a libel action brought by a public official "so as to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U. S. 254, 285; *Beckley Newspapers Corp. v. Hanks*, 389 U. S. 81, 82. Petitioners dispute the Appellate Division's implementation of this mandate on the ground that Respondents' investigation into the published stories was so deficient as to permit a jury to conclude that the publications were made "with reckless disregard of whether [they were] . . . false or not." *New York Times Co. v. Sullivan, supra*, at 280. In so contending, Petitioners fail to set forth any record

facts on this point, but rather simply quote the reasoning of the trial judge, who concluded that the required malice could have been inferred by the jury from the failure to verify the story with any eyewitness other than the informant, Mrs. Agin, from the failure to inquire into Mrs. Agin's motives for relaying the story to the Respondents, from the "characterizations" and "slant" of the publications, from certain factual misstatements, and from the "continuing barrage of repetition of the account of the incident." (Petition, 6-8, 11-12; App. B, 13b-15b).

As to the quality of the overall investigation, this Court has consistently ruled that even a complete failure to make *any* investigation does not in itself establish the requisite malice. *New York Times Co. v. Sullivan, supra* at 287-88; *St. Amant v. Thompson,* 390 U. S. 727, 733. In addition, the undisputed evidence before the trial court, set out at length above in the Counterstatement of the Case, demonstrated that the investigation undertaken in this case was far more thorough than that involved in any of the cases that have been decided by this Court, and was certainly sufficient to satisfy constitutional requirements. Thus, the uncontradicted record revealed that at least three reporters made an investigation into the facts, interviewing Mrs. Agin, the informant, several times; Mrs. Buitrago, the woman involved in the incident in the Clerk's office; and several other individuals, including a call to Theckston himself, who confirmed the fact that Mrs. Buitrago had been arrested and jailed on his initiative. Respondents' publication of the articles involved after such investigation, and in reliance upon the findings, clearly bars a jury from making the required finding "that the defendant *in fact entertained serious doubts* as to the truth of his publication," *St. Amant v. Thompson, supra* at 731, (emphasis added), or had a "high degree of awareness of . . .

probable falsity." See *Garrison v. Louisiana*, 379 U. S. 64, 74; *Beckley Newspapers Corp. v. Hanks*, 389 U. S. 81, 84-85; *St. Amant v. Thompson*, *supra* at 731.

Respondents' reliance upon the information of Mrs. Agin was also plainly insufficient, under the undisputed facts of this case, to demonstrate the required malice. Thus, as set out in detail in the Counterstatement of the Case, Respondents' investigation showed that Mrs. Agin was Theckston's secretary and had in fact typed the memorandum in question, a copy of which was obtained by Higgins. That investigation, moreover, independently confirmed that the incident had occurred in Theckston's office, resulting in Mrs. Buitrago's imprisonment. Further, Mrs. Agin's recitation of the facts on subsequent interviews corresponded "exactly" with her original narration. Rather than indicating any serious doubts as to the truth of her information, Respondents' investigation provided reasonable assurance of their probable truth. Indeed, the insubstantiality of Petitioners' claim is quickly demonstrated by comparing the facts recited above to those in *St. Amant v. Thompson*, *supra*. There in the course of a televised political speech, petitioner St. Amant published a statement assumed by this Court to charge respondent Thompson with criminal conduct. St. Amant's sole source for this charge was an interview with one Albin, a union member he had known for less than a year, and St. Amant made *no* independent investigation into the truth of the charge. Further, St. Amant failed to verify the charge against Thompson with other union members in a position to know the facts, although he had verified other information from the interview independently. On these facts, this Court reversed the libel judgment against St. Amant, holding that:

> "By no proper test of reckless disregard was St. Amant's broadcast a reckless publication about a

public officer. Nothing referred to by the Louisiana courts indicates an awareness by St. Amant of the probable falsity of Albin's statement about Thompson." 390 U. S. at 732-33.

Petitioners next contend, quoting the trial judge, that Respondents' investigation was insufficient to negate a finding of actual malice because "no inquiry was made as to [Mrs. Agin's] . . . motives although there was evidence from which it could be concluded that she was a bitter and disgruntled person who for reasons of her own was attempting to satisfy a grudge against her superior." (Petition, pp. 7, 12; App. B, 14b). It is interesting that Petitioners nowhere identify the evidence supposedly relied upon to demonstrate Mrs. Agin's alleged preexisting prejudice against Theckston. In any event, the full answer to this charge under the decisions of this Court is that there was no evidence to show that Respondents were aware either of any alleged "grudge," or that any prejudice against Theckston resulting therefrom had affected the truth of Mrs. Agin's narration. See *St. Amant v. Thompson, supra* at 733. Indeed, Higgins testified that he had questioned Mrs. Agin several times about her relationship with Theckston and had found nothing that had occurred outside of the normal employer-employee relationship (D-a, 320a).

The contention that certain factual inaccuracies and the "slant" of Respondents' publications libeled Theckston by presenting him, in the trial judge's words, "as an arrogant tyrant who trampled on the rights of innocent persons who had business with the court, and who wrongfully attempted to suppress legitimate criticism of his actions," (Petition, 11) also is constitutionally insufficient to demonstrate the required degree of malice. Even if Respondents

had intended to harm Petitioner through such a portrayal, this standing alone is insufficient to permit a libel judgment to stand against them, since what must be shown is not merely "intent to inflict harm, [but] rather . . . intent to inflict harm *through falsehood.*" *Henry v. Collins,* 380 U. S. 356, 357; *Garrison v. Louisiana, supra* at 73. (Emphasis added.) Here, the Appellate Division of the Superior Court of New Jersey correctly ruled that the inaccuracies did not go to the heart of the alleged libel, which Petitioners themselves describe as the unfavorable *characterization* of Petitioner (Petition, pp. 6-7, 11; App. B, 4b, 5b), but were merely incidental and not vital to the impact of the story as a whole.

In any event, even if the alleged inaccuracies were material, none was published with the required reckless disregard of truth or falsity. Petitioners contend first that Mrs. Buitrago had only one grown son, 21 years of age at the time of her arrest, rather than the five young children mentioned in the first publication. Actually, Mrs. Buitrago served as the foster mother of a 12-year-old nephew and a 16-year-old niece (D-a, 205-206a), and was responsible for them both (D-a, 202a). Moreover, Respondents in their first publication had relied upon Mrs. Agin's recollection here of what Mrs. Buitrago had said when she was arrested (D-a, 214a, 376a, 396a), and also upon the statements of neighbors of Mrs. Buitrago that she had "a slew of kids" (D-a, 226a). Finally, after Mrs. Buitrago had informed Thomas that she had only three children at home, the Inquirer promptly changed its stories to reflect this fact (D-a, 484a; Petition, Exhibits P-2, P-3).

Petitioners next contend that the publications erred factually in stating that the children were left without food or anyone to care for them during the week of Mrs. Buitrago's imprisonment. At the trial, however, Respondents

produced two witnesses who testified without contradiction that the children had to be taken daily to the home of the man whom Mrs. Buitrago had been helping in Theckston's office, and were fed there because of the lack of food in Mrs. Buitrago's home (D-a, 184a, 191a, 208a).

Petitioners next argue that malice was demonstrated by the failure to reveal that Mrs. Buitrago was drunk at the time of arrest, pleaded guilty to the charges against her, and apologized to Theckston the next morning. Although there was some evidence that on September 28, 1963, Harry Potter, a Camden reporter for the Inquirer, may have read to Higgins the police arrest record which revealed a notation that Mrs. Buitrago was drunk (D-a, 437a, 438a), Higgins testified that he talked *the next night* with Thomas and was informed by him that the police records bore no notation on drinking (D-a, 322a). Since a separate "custody sheet" contained information on all arrests, it is probable that Thomas had read this, and not the arrest book, and the custody sheet made no mention of Mrs. Buitrago's drinking (D-a, 508a). In any event, both of the first two publications noted Theckston's contention that Mrs. Buitrago had been drinking, and the second indicated that the American Civil Liberties Union had concluded that Theckston's contention "seemed to stand up" (Petition, P-1, P-2).

Finally, Petitioners rely upon the fact that the first publication contained a report that one of the Buitrago children had called City Hall and said he had twenty-five dollars in rent money and wanted his mother back, but was told he would have to pay an additional five dollars in costs. Higgins testified that he received this information from a City Hall switchboard operator (D-a, 232a, 233a). Petitioners then called to the stand the *County* switchboard operator, who denied making such a statement, but admitted

that there was a separate *City* switchboard on another floor (D-a, 513a, 516a), and that her switchboard was closed at the time of Higgins' Friday evening call (D-a, 513a, 232a). Such evidence was clearly insufficient to prove with convincing clarity that the alleged falsehood, even if material, was made with the actual malice required by the decisions of this Court.

The final item relied upon by Petitioners on which to base a finding of malice is the "continuing barrage of repetition of the account of the incident." Petitioners contend, moreover, that this is the first case before this Court in which more than one publication was involved (Petition 11). Again, this is flatly incorrect, for in *Beckley Newspapers Corp. v. Hanks,* 389 U. S. 81, five separate publications ranging over a two year period were found insufficient to support a finding of malice in publishing the final three articles. See 389 U. S. at 81 (Petition for Certiorari, No. 467, Oct. Term, 1967, App. C, 4a-17a). Moreover, here the first four articles sued upon appeared on three successive days (Petition, P-1 through 4), and the fifth, two days later (P-5). In these circumstances, the mere fact of multiple publication is an insufficient ground on which to base a finding of actual malice, especially in light of the detailed investigation conducted in the week of publication by Respondents.

2. The Record Before the Appellate Division Properly Satisfied the Requirements of the Applicable Decisions of This Court.

Petitioners next argue that the Appellate Division reversed the trial court's judgment in their favor without reading the full record, and in reliance upon an inadequate

Appendix prepared by Respondents. This contention is squarely contradicted by the opinion of the Appellate Division, which specifically states that "We have examined the whole record to ascertain whether plaintiffs have presented a jury issue of liability within the framework of the rule laid down in *New York Times v. Sullivan*" (Petition, Appendix B, 4b). It should be noted that under Rule 1:6-1(a) of the Supreme Court of New Jersey, which is also applicable to proceedings in the Appellate Division under Rule 2:6 of that court, any appellate judge may request from the court below any part of the record which he desires to read.[5]

Moreover, in challenging the Appendix prepared by Respondents in the Appellate Division, Petitioners cited the omitted testimony of only three of 28 witnesses in their answering brief on appeal, and printed only twelve pages of testimony in their Appendix (P-b, 12, 14-19; Appendix, 1a, 20a-31a). Of these three witnesses, Petitioners printed the omitted parts of witness Higgins (P-b, 17), and Respondents printed in sequence the entire testimony of witness Miller, including the omitted passages, in an Appendix to their Reply Brief in the Appellate Division. Although Petitioners claimed the burden of expense precluded them from printing additional testimony, they nevertheless could have designated the parts of the full trial record or the identity of other witnesses deemed vital to their case which were omitted. In addition, they had the right under Rule 1:6-1(a) of the Rules of the New Jersey Supreme Court and Rule 2:6 of the Appellate Division to have such portions of the typewritten record that they deemed necessary to have the appellate court inspect transmitted to that

5. This Rule provides in relevant part that "On the request of any judge of the appellate court the clerk of the court below shall forthwith deliver to the appellate court such portions of the original record or copies thereof as may be ordered."

court.[6] No request, however, was made by Petitioners in either the Appellate Division or the Supreme Court of New Jersey to have any portion of the trial record transmitted to either of those courts. Indeed, despite the fact that Petitioners have now complained of the insufficiency of the appellate record before the Appellate Division, before the Supreme Court of New Jersey, and before this Court, they have yet to summarize, or even to identify, what testimony of relevance was omitted from the record submitted to the Appellate Division by the parties. Thus, what Petitioners' argument comes down to is a simple contention that in every libel case, a defendant must print every shred of testimony in his Appendix at every level of appeal, even where such testimony is extraneous or duplicative, and even where the full typewritten record is available to the court. The burden which would result from such a rule is well demonstrated by the fact that the trial record here comprised some 4390 pages, of which some 2683 was testimony. Clearly, under these circumstances, this point presents no issue worthy of review by this Court on a writ of certiorari.

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6. This Rule provides, in relevant part, that "The record on appeal shall consist of the original record on file in the court or courts below and such additional matters as may be filed in the appellate courts. The clerk of each court shall retain his entire file except that on appeal from a trial court, 70 days after the filing of the transcript of the testimony or notice of appeal, whichever is later, or the approval by the trial court of a statement prepared pursuant to Rule 1:6-3, or if no testimony was taken, the filing of the notice of appeal, the clerk of the court below shall deliver to the appellate court such portions of the original record and original exhibits as the parties may indicate they desire to have available for the personal inspection of the appellate court or at the argument."

3. The Trial Court and the Appellate Division Correctly Treated Petitioner as a "Public Official."

Petitioners' final contention, that Theckston should not have been treated as a "public official," is clearly insubstantial and barred by all of the relevant decisions of this Court. Even if Theckston has not waived this point, as held by the Appellate Division (Petition, Appendix B, 5b), it is clear that as the Clerk of Court of the large metropolitan county of Camden, New Jersey, he was one of "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," as is amply demonstrated by the facts of this case. *Rosenblatt v. Baer*, 383 U. S. 75, 85; *St. Amant v. Thompson, supra* at 730, n. 2. The trial judge, to whom this Court has entrusted the duty of deciding the "public official" characterization in the first instance, *Rosenblatt v. Baer, supra* at 88, correctly so held, reasoning that Theckston's contact with a large section of the public in handling thousands of cases annually made his position "quite properly an object of public scrutiny and of public criticism. . . ." (Petition, App. B, 11b-12b). The "public official" designation, moreover, has consistently been applied to local office-holders by this Court, *New York Times v. Sullivan, supra; Garrison v. Louisiana, supra; Henry v. Collins, supra; St. Amant v. Thompson, supra,* and was applied most recently, without comment, to the Clerk of the Criminal Court of Raleigh County, West Virginia, in *Beckley Newspapers Corp. v. Hanks, supra.* The sole difference between the position involved in *Hanks* and the present one is that Hanks was elected, and that is a distinction without a difference. *Rosenblatt v. Baer, supra.* Thus, no question appropriate for this Court's review on a writ of certiorari is presented by this point.